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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958

No. 944

HERSHEY MFG. CO., an Illinois Corporation,
Appellant,

vs.

BENJAMIN S. ADAMOWSKI, individually and as State's Attorney of Cook County; **JOSEPH D. LOHMAN**, individually and as Sheriff of Cook County; **TIMOTHY J. O'CONNOR**, individually and as Commissioner of Police of the City of Chicago; **WILLIAM G. MILOTA**, individually and as Bailiff of the Municipal Court of the City of Chicago; and **LATHAM CASTLE**, Attorney General of the State of Illinois,
Appellees.

On Appeal from the United States District Court For the Northern District of Illinois.

Jurisdictional Statement

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Appellees.

On Appeal from the United States District Court For the Northern District of Illinois.

Jurisdictional Statement

Appellant appeals from the final order of a United States District Court of three judges for the Northern District of Illinois, entered on February 9, 1959, granting the motion to dismiss, dissolving the temporary injunction

and dismissing the cause, and the order denying the motion to vacate and other relief* entered on April 14, 1959, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW.

The opinion of the District Court for the Northern District of Illinois, Eastern Division is not yet reported. Copies of the memorandum and order and dissenting opinion, are attached hereto as Appendix A, *infra*, p. 1a, 9a.

JURISDICTION.

This suit was brought under 28 U.S.C., §1331, to restrain the enforcement of a statute of the State of Illinois entitled "An Act to Protect All Counties in the State of Illinois in which there are United States Naval Stations and Military Posts of the First Class from Slot Machines and Other Gambling Devices" (Ill. Rev. Stat. Ch. 38, §344 *et seq.*) on the ground that such statute as applied to plaintiff's business of manufacturing parts and subassemblies of slot machines for shipment in interstate and foreign commerce in compliance with the Johnson Act, Title 15 U.S.C., §1171 *et seq.* is repugnant to the Commerce and Supremacy clauses of the Constitution of the United States and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States. The order of the district court dismissing the complaint was entered on February 9, 1959. A motion to vacate such order was denied on April 14, 1959 and notice of appeal

* On February 17, 1959 the court had granted the prayer for a temporary injunction and enjoined enforcement of the challenged statute until further order of the court.

was filed in that court on April 20, 1959. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 U.S.C., §§1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Doud v. *Hodge*, 350 U.S. 485; *Hines* v. *Davidowitz*, 312 U.S. 52; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55; *Valentine* v. *Great Atlantic & Pacific Tea Co.*, 299 U.S. 32; *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550; *Sterling* v. *Constantine, et al.*, 287 U.S. 378; *Railroad Commission of California* v. *Los Angeles Railway Corp.*, 280 U.S. 145; *Fidelity & Deposit Co. of Maryland* v. *Tafoya*, 270 U.S. 426; *Michigan Public Utilities Commission* v. *Duke*, 266 U.S. 570; *Pacific Telephone & Telegraph Co.* v. *Kuykendahl*, 265 U.S. 196; *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U.S. 271; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U.S. 290; *So. Covington, etc. Ry. Co.* v. *Newport*, 259 U.S. 97; *Lee* v. *Rickle*, 292 U.S. 415.

QUESTIONS PRESENTED.

1. Did the district court have jurisdiction under Title 28 U.S.C., Sec. 1331 of this suit involving the requisite jurisdictional amount and substantial federal questions?

2. Is a substantial federal question under the Commerce and Supremacy clauses of the Constitution presented by a complaint seeking to enjoin the enforcement of a state statute prohibiting the manufacture of gambling devices in a county in the state "in which there is a United States Military Post or United States Naval Training Station of the First Class" by seizure from a shipment to a state in which their assembly and use is lawful and from

a factory, of parts and subassemblies of gambling devices, manufactured for sale in interstate and foreign commerce and sold and labeled in compliance with the Johnson Act, T. 15 U.S.C., 1171 *et seq.*?

3. Is a substantial federal question under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution presented by an attack upon a state statute the legislative history and substance of which show that the state legislature did not intend to prohibit all manufacture of certain items, but only their manufacture in counties having military establishments "of the first class" (a) when such classification is not defined in the statute nor in any other statute, has no common law meaning and has not been previously judicially construed; and (b) when such classification has no reasonable basis or relationship to the protection of the health, safety or morals of the public?

4. In this suit seeking to enjoin actions under a state statute the constitutionality of which was expressly placed in issue by the complaint and responsive pleadings labeled "motion to dismiss" was there an issue for a three judge court under Sections 2281 and 2284, Title 28, U.S.C.?

5. Can a district court of three judges properly dismiss on motion for want of jurisdiction a suit, involving the necessary jurisdictional amount, to enjoin acts interfering with interstate commerce which the court has found "properly enjoinable if proved"?

6. Does a dist[illegible]urt of three judges lack jurisdiction to determine th[illegible]itutionality of a state statute which "may seem to [illegible]e the due process clause of the Fourteenth Amendment of the United States Constitution" because the state Supreme Court "has not yet so interpreted it"?

7. Does a district court of three judges lack authority to enjoin the enforcement as to plaintiff of a statute which, as actually applied to plaintiff by state enforcement officers, deprives it of due process of law and equal protection of the laws?

8. If the district court did have jurisdiction and if the case was one for the application of the so-called doctrine of "discretionary abstention" was it proper for the district court to dismiss the complaint?

9. Did the complaint as amended allege sufficient facts to show the danger of immediate and irreparable injury to plaintiff?

STATUTES INVOLVED.

The statutes involved are "An Act to Protect All Counties in the State of Illinois in which there are United States Naval Stations and Military Posts of the First Class from Slot Machines and Other Gambling Devices" (Ill. Rev. Stat. Ch. 38, §344 *et seq.*); and the Johnson Act, 15 U.S.C. §§1171 *et seq.*, T. 28 U.S.C. §§1331 and 2281. These statutes are set forth in full in Appendix B hereto.

STATEMENT.

Appellant, an Illinois corporation, on July 14, 1958 filed its complaint in the United States District Court for the Northern District of Illinois invoking the jurisdiction of that court under Title 28 U.S.C. § 1331. The cause was assigned to the calendar of Judge Campbell.

The complaint alleged that in addition to manufacturing camera accessories, and milk, soft drink and bread dispensers, plaintiff, with approximately $500,000 of tools, dies and plans, manufactures and ships in interstate commerce in compliance with the Johnson Act, parts and subassemblies of coin operated devices, defined as gambling devices or slot machines; that the challenged statute, adopted in 1919, was never interpreted and enforced as affecting the interstate manufacture and shipment of slot machine parts and subassemblies, in which plaintiff engages, until the recent actions sought to be enjoined. These were: the seizure from Transworld Airlines of 31 parcels of slot machine subassemblies and parts which are plaintiff's property, in the course of interstate commerce from Illinois to Nevada, in complete compliance with the Johnson Act; the seizure of parts, subassemblies, papers and shipping stencils from plaintiff's factory, and threats to seize and destroy property of plaintiff and its customers in interstate commerce and to continue and repeat the depredations against and interference with the property and bus-

iness of plaintiff in interstate commerce, thereby causing substantial and irreparable loss and damage to plaintiff and its employees, compelling it to cease the manufacture and interstate shipment of such merchandise.

The complaint alleged that said statute, entitled "An Act to Protect all Counties in the State of Illinois in which there are United States Naval Stations and Military Posts of the First Class from Slot Machines and other Gambling Devices" (Ill. Rev. Stat. Ch. 38, §344 *et seq.*) is invalid and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that on its face it is vague and uncertain so that persons affected by it cannot determine in what counties it would apply nor what conduct would be violative of its provisions and that the challenged statute as applied to plaintiff is an attempt by the State of Illinois to legislate in a field which has been pre-empted by Congress by enactment of the Johnson Act, 15 U.S.C. §1171 *et seq.*, and, therefore, contrary to the Commerce and Supremacy clauses of the Constitution.

When the complaint was filed on July 14, 1958 application for a temporary restraining order was made to Judge Perry, sitting in the summer vacation as emergency motion judge. After hearing evidence and arguments on July 25th and July 28th, 1958, and finding that irreparable damage would otherwise result, Judge Perry entered a temporary restraining order pursuant to Title 28 U.S.C. §2284(3).

The motion to dismiss filed by defendant Adamowski on July 25, 1958 sought dismissal on the ground, among others, that application had not been made for a court of three judges. However, Judge Perry, upon examination of the complaint, had already requested the chief judge of the circuit to appoint three judges.

On July 31, 1958 the chief judge designated Circuit Judge Schnackenberg and District Judge Hoffman to sit with Judge Campbell, to whom the case had been assigned.* On September 29, 1958 the court convened, heard arguments on the motions to dismiss and continued in force the temporary restraining order.

On February 9, 1959 the court granted the motions to dismiss, dissolved the temporary restraining order and dismissed the cause at appellant's costs, the circuit judge dissenting.

In a memorandum prepared by a majority of the court it was said that the allegations as to seizures of appellant's property in interstate commerce brought the case within the jurisdiction of a single district judge but that jurisdiction of the "Three Judge Court" was lacking, that interpretation of the challenged statute as well as another Illinois statute, the Act of 1895, Ch. 38, Ill. Rev. Stat., § 341, *et seq.* was involved, that the Illinois Supreme Court has not interpreted the challenged statute as denying due process of law, that the doctrine of "discretionary abstention "should be exercised here by the dismissal of a complaint which asks a decision on the merits concerning unresolved questions of state law and questions of Constitutional law never before decided by the State Supreme Court"; that the complaint does not present a "substantial Constitutional claim"; that, therefore, the "Three Judge Court" was without jurisdiction. The court held that even if it had jurisdiction the complaint does not show the danger of immediate and irreparable harm and that the plaintiff has "many adequate remedies at law".

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* *Cf., Two Guys from Harrison—Allentown, Pennsylvania, Inc.* v. *McGinley* (3rd Circuit)—F. 2d—Mar. 25, 1959, as amended April 20, 1959.

Circuit Judge Schnackenberg, dissenting, stated that the majority opinion undoubtedly overlooked the language of this Court in *Doud* v. *Hodge*, 350 U.S. 485:

> "It is clear that the District Court had jurisdiction to entertain appellant's complaint by virtue of the authority vested in it by 28 U.S.C., §§ 2281 and 2284. This Court has never held that a district court is without jurisdiction to entertain a prayer for an injunction restraining the enforcement of a state statute on grounds of alleged repugnancy to the federal Constitution simply because the state courts had not yet rendered a clear or definitive decision as to the meaning or federal constitutionality of the statute."

Thereafter, on February 17, 1959 the court entertained a timely motion to vacate the order of dismissal and for other relief including a permanent injunction to restrain defendants from enforcing the challenged statute against appellant, and pending action on the motion, enjoined the defendants from enforcing the challenged statute against appellant until further order of the court. After further argument, on April 14, 1959, the motion to vacate the order of dismissal was denied.

During argument of the motion to vacate Judge Hoffman indicated his view that in the absence of state court interpretation and construction of the challenged statute the district court is without jurisdiction. The two district judges, the circuit judge dissenting, denied an application for a temporary injunction pending determination of this case on appeal, holding that the previous orders of the court had been without authority.

THE QUESTIONS ARE SUBSTANTIAL.

The first, sixth, seventh and eighth questions involved in this appeal are similar to those thought to have been settled in *Doud* v. *Hodge*, 350 U.S. 485. In the *Doud* case this Court stated that it had "never held that a district court is without jurisdiction to entertain a prayer for an injunction restraining the enforcement of a state statute on grounds of alleged repugnancy to the federal Constitution simply because the state court had not yet rendered a clear or definitive decision as to the meaning or federal constitutionality of the statute." The Circuit judge states correctly, we believe, that the decision of this Court in *Doud* v. *Hodge* is applicable.

All that appellant seeks in this case is to restrain the enforcement of the challenged statute insofar as it is applied to appellant's business of manufacturing parts and subassemblies of so-called slot machines for shipment and delivery in commerce in compliance with the Johnson Act, Title 15 U.S.C. §§1171 *et seq.* State officers have actually acted pursuant to the state statute against appellant's property and business both before and since the judgment below, and have threatened to and continue to enforce such statute and their action unless restrained does prevent appellant from engaging in its business. Even if the challenged statute, the enforcement of which is sought to be enjoined on the ground of its unconstitutionality, were found not to apply to appellant's business, the actual interference and threatened future interference with appellant's business pursuant to such statute is unlawful and subject to restraint by a federal court of equity of three judges. *Lee* v. *Bickle*, 292 U.S. 415; *Modern Woodmen of America* v. *Casados*, 15 Fed. Supp. 483; *United Airlines* v. *Public Utilities Comm.*, 109 Fed. Supp. 13.

It is believed that there is a special problem in the United States District Court for the Northern District of Illinois concerning the jurisdiction of that court to entertain a prayer for an injunction to restrain enforcement of a state statute on the ground of its alleged repugnancy to the federal constitution in the absence of prior consideration of such state statute by the Supreme Court of Illinois. The problem is aggravated by the insistence of the Attorney General of Illinois and the State's Attorney of Cook County, Illinois, to whose views great weight should ordinarily be given, that the District Court in such circumstances is without "original" jurisdiction. Under these special circumstances this question of jurisdiction needs to be passed upon again by this Court.

2. It appears from the memorandum of the court below that it regards a "Three Judge Court" as a court of special jurisdiction, separate and apart from the district court. Thus in its view, relying upon the Court of Appeals decision in *Cloverleaf Butter Co.* v. *Patterson*, 116 Fed. 2d 227*, the complaint presented a federal question for a single district judge which if proved, is properly enjoinable, but that such question is not cognizable by the "Three Judge Court" which regardless of the relief sought, is understood to have jurisdiction only if the substantial federal questions necessarily decided are constitutional questions.

"In our view a district court of three judges has jurisdiction coextensive with that of a district court of one judge, with the important difference that the single judge may not grant an interlocutory or permanent injunction restraining the enforcement of a state statute upon the ground of its unconstitutionality; a court of three judges

* Reversed by this Court in 315 U.S. 148.

is properly convened whenever such relief is sought. The statute, of course, limits the authority of a single district judge but not that of a court of three judges properly constituted and convened. *Fisher* v. *Brucker*, 41 Fed. 2d 774; *Modern Woodmen of America* v. *Casados*, 15 Fed. Supp. 483; *United Airlines* v. *Public Utilities Comm.*, 109 Fed. Supp. 13.

It is believed that the administration of justice in the Northern District of Illinois requires a clear exposition by this Court of the jurisdiction of a district court of three judges.

3. While the court below dismissed the cause for want of jurisdiction for the stated reason that the challenged statute had not been previously considered by the Supreme Court of Illinois,* which is believed to be an erroneous reason, its jurisdiction does depend upon there being substantial federal questions presented, since diversity of citizenship is not present.

The several questions presented by the complaint are believed to be substantial and important.

The challenged statute prohibiting the manufacture of slot machines in counties having military establishments "of the first class" is believed to violate the due process and equal protection clause of the Fourteenth Amendment. The phrase "of the first class" is not defined in the statute, has not been given previous judicial construction, has no other statutory meaning and has no common law meaning.

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* To our knowledge, the only Illinois Court to pass on the challenged statute heretofore was the County Court of Lake County, Illinois in **People v. Korwin**, Number 12552. Hulse, J. held that the words "of the first class" had no meaning and that the statute was therefore unconstitutionally vague. No appeal was taken by the State.

When the bill for such Act was originally introduced in the Fifty-first General Assembly in Illinois in 1919 as Senate Bill 161 it carried a paragraph as follows: "Definition: A military post or naval station of the first class shall mean one in which there is at the time of the passing of the Act accommodation for 25,000 soldiers or apprentice seamen." Such definition was stricken before the passage of the Senate bill in the House.

The challenged statute appears to us to be unconstitutionally vague. *Connally* v. *General Construction Co.*, 269 U. S. 385, 391-392.

It is also believed that the challenged statute offends the due process clause of the Fourteenth Amendment in that it fails to provide for any notice, hearing or judicial determination as to whether a particular machine seized pursuant to it is one proscribed. The State's Attorney represented to the court below that he was not bound under the statute to take seized propery before a court for a determination on notice as to whether it is in violation of the Act. He claims that it is his practice to seek such determination but he is not required to do so (R. 88, 231). In oral argument before the district court of three judges he stated that on at least one occasion after seeking a judicial determination and stipulating that certain property seized was not gambling equipment and after being ordered by the court to return such property to the claimant he caused its destruction (R. 233).

The challenged statute also appears to offend the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that there does not appear to be any reasonable basis for the classification between manufacturers of parts and subassemblies of slot machines for lawful shipment out of Illinois in interstate and foreign commerce, that are located in a county having

a military establishment of the first class and an identical manufacturer not located in such a county. We do not perceive how the classification has any relationship to the health, morals or safety of the people of either county and it appears to us that such classification is purely discriminatory. See *Morey* v. *Doud*, 354 U.S. 457, 463-466.

The challenged statute is believed to offend the Commerce and Supremacy clauses of the Constitution. No federal court has heretofore passed upon the question whether the Johnson Act, Title 15 U.S.C. §§1171 *et seq.*, has pre-empted state regulation of the manufacture and interstate sale of parts and subassemblies of slot machines, thereby invalidating the challenged statute insofar as it is applied to prevent the manufacture of parts and subassemblies of slot machines for lawful interstate and foreign commerce.

The substantiality of the pre-emption question is demonstrated by the decision of this Court in *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, 169. The federal statutes there which were held to have pre-empted state action defined processed or renovated butter, fixed the rate of poundage tax upon it, as well as the amount of special tax upon its manufacture, and provided for their collection. The statutes required manufacturers to file such notices and inventories, keep such books, render such returns, post such signs, affix such number to his factory and furnish such bond as the Treasury Department might require. Wholesale dealers were required to keep books and render returns to the same department. Penalties were provided. Specific provisions were made for inspection of the places of manufacture or storage of the materials and the renovated butter itself. Power was given to confiscate the finished product.

Some of these sections are similar to sections of the Johnson Act, Title 15 U.S.C. §§1171, 1173, 1174, 1176, 1177.

Apart from the question of pre-emption there is a substantial question as to whether the challenged statute is invalid as authorizing an unlawful interference with interstate commerce.

"The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the federal Constitution." *Railroad* v. *Husen*, 95 U.S. 465, at 473-474.

If a state cannot ban interstate shipment of all Texas cattle to protect itself from diseased cattle it is a substantial question whether it can ban lawful exportation in interstate and foreign commerce of parts not noxious in themselves to protect itself from the intrastate use of slot machines. The Johnson Act in effect recognizes that parts and subassemblies destined for use in states where their use is lawful and in foreign countries are legitimate subjects of commerce. *Cf. Champion* v. *Ames*, 188 U.S. 321; *Johnson, et al.* v. *Yellow Cab Transit Co.*, 321 U.S. 383, 386; *Pace* v. *Milliken*, 70 F. Supp. 740, 742. As Mr. Chief Justice Fuller said in *Leisy* v. *Hardin*, 135 U.S. 100, at 125:

> "Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations."

The property in question until assembled is not a machine outlawed in Illinois under any statute of Illinois other than the challenged statute and when assembled in Nevada has a lawful use. The use of the police power in this instance has the effect of regulating the morals of the State of Nevada contrary to the declared public policy of that state,

(Nev. Rev. Stat., §§463.10 and 463.20) and has no reasonable relation to the health, morals and safety of the Illinois public.

4. Although contrary to this Court's decisions the court below dismissed the cause for want of jurisdiction, it also found that plaintiff had "many adequate remedies at law". This finding is belied by the facts that (a) the emergency judge after proceedings in accordance with Title 28 U.S.C. §2284(3) found that appellant would be irreparably injured unless a restraining order were issued, (b) the three judge court issued a temporary injunction, (c) the motions to dismiss admitted the specific allegations of irreparable injury to plaintiff's property and business by their threatened destruction, and (d) the answer to the motion to vacate filed by appellees asserted that appellant could apply to a state court of equity to restrain the enforcement of the statute, after the multiplicity of suits mentioned by the court below.

As set forth in the application for injunction presented to Mr. Justice Clark and undenied in appellees' written objections thereto, appellees on April 15, 1959, with knowledge that this appeal would be taken, and immediately following the lifting of the temporary restraining order by the court below for the stated reason of lack of jurisdiction, arrested appellant's president on a warrant issued under the challenged statute and seized more of appellant's property in a search incident to such arrest. Because of these seizures and the constant threat of repeated depredations against its property and business, appellant is unable to operate the business it here seeks to protect.

Judge Perry, the emergency motion judge who issued the temporary restraining order, and Judge Schnackenberg, the Circuit judge who joined in orders restraining the en-

forcement of the challenged statute and dissented from the order denying a temporary restraining order pending appeal to this Court, correctly recognized the district court's jurisdiction and the great and immediate irreparable injury to appellant.

It is no adequate remedy to take a test case through the state courts, and perhaps finally to this Court, while appellant is out of business, its employees laid off and its customers are being lost to its more fortunate competitors. *Toomer v. Witsell*, 334 U.S. 385.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

Hershey Mfg. Co., an Illinois Corporation,
Plaintiff,
vs.
Benjamin S. Adamowski, individually and as State's Attorney of Cook County;
Joseph D. Lohman, individually and as Sheriff of Cook County;
Timothy J. O' Connor, individually and as Commissioner of Police of the City of Chicago;
William G. Milota, individually and as Bailiff of the Municipal Court of the City of Chicago; and
Latham Castle, Attorney General of the State of Illinois,
Defendants.

No. 58 C 1287

Before Schnackenberg, Circuit Judge
Campbell and Hoffman, District Judges

Campbell and Hoffman, District Judges.

MEMORANDUM AND ORDER

Plaintiff has filed this action against the defendants under the provisions of Title 28 U.S.C. Sec. 1331, alleging that the matter in controversy exceeds the sum of Three Thousand ($3000.00) Dollars exclusive of interest and costs and arises under the Constitution, laws and treaties of the United States.

Plaintiff maintains and operates a factory in Chicago, Illinois, and manufactures, among other things, parts and sub-assemblies of gambling devices upon the order of and delivery to customers in interstate and foreign commerce. Plaintiff has also complied with the requirements of the Johnson Act (Title 15 U.S.C. Sec. 11171 *et seq.*) which pertains to the interstate shipment of these devices.

The plaintiff alleges that on, to-wit, June 27, 1958, the defendant Benjamin S. Adamowski, State's Attorney of Cook County, Illinois, acting individually and through officers and agents employed by him and supplied to him and authorized by the other defendants, did seize without warrant or other lawful process, 31 parcels of slot machine sub-assemblies and parts which were the property of the plaintiff from the physical possession and custody of Trans World Airlines, Inc., a corporation, and interstate carrier, licensed by Federal authority, while said property was in the course of interstate commerce from the State of Illinois to the State of Nevada which shipment was in complete compliance with the Johnson Act.

The plaintiff also alleges that Benjamin S. Adamowski and other defendants and their agents, deputies and police officers on June 27, 1958 entered the factory of the plaintiff under the purported authority of a Search Warrant and seized sub-assemblies and parts of slot machines which were possessed and being shipped by the plaintiff in accordance and compliance with the Johnson Act.

The plaintiff further alleges that the seizure of these devices by the defendants was made pursuant to a statute of the State of Illinois entitled "An Act to protect all counties in the State of Illinois in which there are United States Naval Stations, and Military Posts of the first class from slot machines and other gambling devices." (Ill. Rev. Stat. Chap. 38 Sec. 344 *et seq.*) Sec. 344. of this Act provides:

> "That it shall be unlawful for any person, firm or corporation, as owner, agent, or otherwise, to manufacture, sell, lease, or hold, or offer for sale, or lease to another any clock, joker, punch board, tape or slot machine, or any other device upon which money is staked or hazarded, or into which money is paid or played upon chance, or upon the result of the action of which money or valuable thing is staked, bet, hazarded, won or lost, in any county in the State of Illinois, in which there is a United States military post, or United States Naval Training Station of the first class."

Sections 345 and 346 provide for the confiscation and destruction of such devices as well as penalties for the violation of the Act. Section 347 provides that the sale and lease of such devices is unlawful and that proof of non use or disrepair is not a defense to prosecution.

Plaintiff maintains that this statute is invalid and in violation of the 14th Amendment to the Constitution of the United States, alleging that on its face, it is vague and uncertain so that persons affected by it cannot determine in what counties it would apply, nor what conduct would be violative of its provisions. Accordingly the plaintiff has requested the convening of this Three Judge Court praying it to so hold.

Plaintiff also attacks the Statute as an attempt by Illinois to legislate in a field which has been preempted by Congress by enactment of the Johnson Act.

Upon plaintiff's representation of immediate and irreparable loss for which no adequate remedy exists at law, a temporary restraining order was issued by the Emergency Judge on July 28, 1958, and this Three Judge Court convened in accordance with Title 28, U.S.C. Sec. 2281 *et seq.*

Defendants now move to dissolve the restraining order and to dismiss the complaint asserting that the Court does not have original jurisdiction of this matter and that the plaintiff is not entitled to equitable relief.

Whether it is spoken of in terms of "delegated" and "reserved" powers of the United States Constitution or the philosophy of "State's rights", it is a matter of well documented history (See 47 Harv. L. Rev. 795; 41 Harv. L. Rev. 623; 16 Minn. L. Rev. 1) that the predecessors of Sec. 2281 as well as Sec. 2281 were "enacted for the manifest purpose of taking away the power of a single United States Judge . . . to issue an . . . injunction against the execution of a state statute by a state officer . . . on the ground of the Federal unconstitutionality of the statute . . . The wording of the section leaves no doubt that Congress was by provisions *ex industria* seeking to make interference by . . . injunction from a Federal court with the enforcement of state legislation, regularly enacted and in the course of execution, a matter of the adequate hearing and the full deliberation which the presence of three judges . . . was likely to secure. It was to prevent the improvident granting of such injunction by a single judge, and the possible unnecessary conflict between Federal and State authority always to be deprecated." *Cumberland Tel. Co.* v. *Pub. Serv. Comm.*, 260 U.S. 212, 216; *Philips* v. *U. S.*, 312 U.S. 246.

Because of the philosophy underlying Sec. 2281, it is not to be interpreted as a measure of broad social policy to be construed with great liberality, but rather as an enactment technical in the strict sense of the term which must be applied as such. *Philips* v. *U.S., supra.* Therefore, there must be a substantial claim of unconstitutionality of a State statute presented within the complaint before a Three Judge Court will have jurisdiction over a particular cause. *California Water Service Co.* v. *City of Redding*, 304 U.S. 252.

Even if such a substantial claim is presented to the Court, injunctive relief will be precluded for a lack of

equitable grounds if, for example it is seen that plaintiff will not suffer immediate and irreparable harm, *American Federation of Labor* v. *Watson*, 327 U.S. 582; or that plaintiff has an adequate remedy at law, *Toomer* v. *Witsell*, 334 U.S. 385; or that plaintiff has unclean hands, *Durant* v. *Bennett*, 54 F. 2d 634.

We first consider the effect of Federal legislation on the subject matter of gambling devices. The Johnson Act (Title 15 U.S.C. Sections 1171-1177) was passed for the primary purpose of supporting "the policy of those states which outlaw slot machines and similar gambling devices, by prohibiting use of the channels of interstate or foreign commerce for the shipment of such machines or devices into such states." See U.S. Code Congressional Service Vol. 2 (1950) p. 4240.

Section 1171 of this Statute defines a gambling device and specifically includes as such, parts and sub-assemblies of these devices. Section 1172, insofar as material provides as follows:

> "It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or .. possession of the United States from any place outside of such State, the District of Columbia, or possession; *Provided*, that this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provision of this section."

Section 1173 requires manufacturers and dealers in such devices to register with the Attorney General and to file monthly inventories and detailed records of sales and deliveries. Section 1174 requires that shipping containers be plainly marked to show what they are and the names and

addresses of the consignees. Sections 1176 and 1177 provide criminal penalties for violators and for the seizure and forfeiture of their gambling devices or parts thereof.

Assuming that the Johnson Act does pre-empt interstate shipment of gambling devices, this phase of the case is clearly not cognizable by this Three Judge Court for many reasons. First, some of the slot machine sub-assemblies and parts are alleged to have been seized from the possession of Trans World Airlines, Inc., without warrant or other lawful process by officials of the State of Illinois. This is an attack upon the exercise of authority in a particular case and is not an attack upon the constitutionality of a statute. *Phillips* v. *United States, supra,* at pages 252, 253. Jurisdiction is therefore lacking in this Three Judge Court since this does not constitute a suit against the State but comes within the recognized Federal jurisdiction over persons purporting to act as officers of the State and, in the course thereof, to deprive citizens of rights granted to them by the Federal Constitution and laws. *Ex Parte Bransford,* 310 U.S. 354, 361; *Cloverleaf Butter Co.* v. *Patterson,* 116 F. 2d 227. This phase of the pending suit might properly be one for a single district judge under the Johnson Act involving merely an alleged interference with interstate commerce, properly enjoinable if proved. It is clearly not one cognizable by this Court. *Phillips* v. *U.S., supra; Cloverleaf Butter Co.* v. *Patterson, supra.* So much for that part of defendant's motion relating to the seizure herein of articles alleged to be lawfully moving in interstate commerce.

As to the remainder of the seizure comprising similar articles taken at plaintiff's plant allegedly under the authority of the Illinois Statute the *constitutionality* of which is challenged by the complaint, the defendants in support of their motion to dismiss have asserted other Illinois

Statutes under which they claim to have acted, the constitutionality of which is not and they say, cannot be challenged. Ill. Rev. Stat. Chap. 38, Sections 341-343. Section 342 defining gambling devices has been construed by the Supreme Court of Illinois in *People* v. *One Device*, 410 Ill. 318. There, the court held that gambling devices as defined in Sec. 342 are not lawful subjects of property which the law protects but have ceased to be regarded or treated as property and are at all times liable to seizure, forfeiture and destruction without violating any constitutional provisions. That the seizure of such devices would not violate the due process clause is sustained by *Lawton* v. *Steele*, 152 U.S. 133; *Durant* v. *Bennet*, 54 F. 2d 634.

There is no way for this court properly to determine this phase of the case by an interpretation of the one Statute challenged in the complaint. This interpretation under both Federal and State Constitutions as well as the determination of which Illinois Statute properly applies and the determination of the many factual issues presented, all belong to the Illinois courts. *Watson* v. *Buck*, 313 U.S. 387, 401. This court cannot assume jurisdiction of this case because the single statute challenged in this complaint may seem to violate the due process clause of the 14th Amendment of the United States Constitution. The Illinois Supreme Court has not yet so interpreted it and, in any event, the police power of a state would allow the confiscation of gambling equipment without violation of the due process clause under the theory that such devices are no longer lawful property. *Lawton* v. *Steele*, *People* v. *One Device*, *Supra.*

The doctrine of "discretionary abstention" so frequently urged upon us by the Supreme Court in its construction of Section 2281, should be exercised here by the dismissal of a complaint which asks a decision on the merits concerning unresolved questions of State law and questions of

Constitutional law never before decided by the State Supreme Court. Plaintiff has not presented in its complaint a substantial Constitutional claim in regard to the one Statute challenged. Therefore, this Three Judge Court is without jurisdiction of this cause. To assume jurisdiction under the facts as presented in the complaint would be an abuse of Sec. 2281.

Furthermore, even if this Court has jurisdiction of the cause, plaintiff is not properly in equity since no immediate and irreparable harm will occur to the plaintiff if this court does not proceed. *Douglas* v. *Jeanette*, 319 U.S. 157. Before the property in question can be destroyed, it must under Illinois law be brought before a "judge, justice or court" which will make a determination as to the disposition of such property at which time the Constitutionality of the Statute may be raised. Ill. Rev. Stat. Chap. 38, Sec. 697. Even if the property were destroyed unlawfully the harm would not be irreparable since an action for damages would lie and gambling devices are not so unique that they cannot be replaced.

Plaintiff has many adequate remedies at law either under Sec. 697 *supra*, at which time the constitutionality of the Statute may be raised, or by way of replevin in which it may raise the same question, or by way of declaratory judgment under the Illinois Civil Practice Act, Sec. 57.1 (Ill. Rev. Stat. Chap. 110 Sec. 57.1), or by way of damages if the property were destroyed unlawfully.

For these reasons, the motion to dismiss is hereby granted, the temporary restraining order is dissolved and the cause is dismissed at plaintiff's costs

/s/ WILLIAM J. CAMPBELL
/s/ JULIUS J. HOFFMAN
Judges, United States District Court
for the Northern District of Illinois

February 9, 1959

SCHNACKENBERG, Circuit Judge, dissenting.

The district judge to whom this case was originally assigned requested the chief judge of the United States Court of Appeals for the Seventh Circuit, to designate, pursuant to 28 U.S.C.A. §2284, a three-judge court, to hear and determine this action. Such a three-judge court was appointed and is now acting. It has heard arguments on motions filed by defendants to dismiss the proceeding.

Plaintiff's complaint is based in part, upon a contention that §344, *et seq.* ch. 38, R.S. Ill., relied on by defendants, is unconstitutional in that it violates the constitution of the United States.

The motion to dismiss filed by Latham Castle, attorney general for the state of Illinois, states as a ground therefor: "Notwithstanding the arguments and protestations of the Plaintiff the statute assailed, to wit:

> 'An act to protect all counties in the State of Illinois in which our United States naval stations and military posts of the first class from slot machines and other gambling devices' (Par. 344, *et seq.*, Ch. 38 Ill. Rev. Stats. 1957)

is constitutional and valid in all its aspects and does not contravene any of the provisions of the Constitution of the United States * * *."[1]

This three-judge court must continue to perform its functions in this case until it disposes of the contention of plaintiff that said Illinois act relied upon by defendants as a justification for their seizure of plaintiff's property, is

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[1] The motion to dismiss filed by the state's attorney of Cook County, Illinois, states "Inasmuch as the complaint prays for a determination of unconstitutionality of an Illinois statute, applications should have been made for a three-judge court in accordance with the provisions of 28 U.S.C.A., Secs. 2281-2284 inclusive."

violative of plaintiff's federal constitutional rights. Both the attorney general of the state of Illinois and the state's attorney of Cook County, Illinois, in their motions aforesaid, recognize that this is the proper procedure.

As to the language of the majority opinion to the effect that an interpretation of the Illinois statute belongs to the Illinois courts, undoubtedly the language of the United States Supreme Court, in *Doud* v. *Hodge*, 350 U.S. 485, has been overlooked:

> "It is clear that the District Court had jurisdiction to entertain appellants' complaint by virtue of the authority vested in it by 28 U.S.C. §§ 2281 and 2284. This Court has never held that a district court is without jurisdiction to entertain a prayer for an injunction restraining the enforcement of a state statute on grounds of alleged repugnancy to the Federal Constitution simply because the state courts had not yet rendered a clear or definitive decision as to the meaning or federal constitutionality of the statute."

/s/ ELMER J. SCHNACKENBERG

APPENDIX B

Chap. 38 Ill. Rev. Stat., par. 344 et seq.

AN ACT to protect all counties in the State of Illinois in which there are United States naval stations, and military posts of the first class from slot machine and other gambling devices. [Filed July 11, 1919. L. 1919, p. 689.]

344. SLOT MACHINES IN COUNTIES WHERE ARMY POST.] § 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*: That it shall be unlawful for any person, firm or corporation, as owner, agent or otherwise, to manufacture, sell, lease, or hold, or offer for sale, or lease to another any clock, joker, punch board, tape or slot machine, or any other device upon which money is staked or hazarded, or into which money is paid or played upon chance, or upon the result of the action of which money or valuable thing is staked, bet, hazarded, won or lost, in any county in the State of Illinois in which there is a United States military post, or United States naval training station of the first class.

345. MACHINE MAY BE DESTROYED.] § 2. Every such machine described in this Act is hereby declared a gambling device, and shall be subject to seizure, confiscation and destruction by any municipal, or other local authority, within whose jurisdiction the same may be found.

346. PENALTY.] § 3. Any person, firm or corporation, who, by himself or another his principal, agent or otherwise, shall violate the provisions of this Act, shall be fined for the first offense not less than $100.00, and shall be imprisoned for thirty days in the county jail, and for the second offense not less than $500.00, and shall be confined in the county jail not less than six months, and for each subsequent offense shall be fined not less than $500.00 and imprisoned in the penitentiary for one year.

347. SALE—LEASE—WHAT NOT DEFENSE.] § 4. It shall be unlawful to bargain for the sale or lease of any gambling machine described in this Act, or to collect money, or to take compensation for such sale, or lease, or to take or accept money from any person, or from any such machine as a share or royalty, or compensation for any such lease, or sale. Proof that such machine or device when seized has not been used, or is out of repair, shall not constitute a defense to a prosecution under this Act.

348. NUISANCE.] § 5. All places where slot machines and other gambling devices are held or operated shall be taken and declared to be common and public nuisances, and whosoever shall keep any such place by himself or his agents or servant, shall, for each offense, be fined not less than $100.00, and shall be confined in the county jail for thirty days, and for each subsequent offense shall be fined $500.00 and confined in the county jail for six months.

EXCEPTION.] Vending machines by which full and adequate return is made for the money invested and in which there is no element of chance or hazard shall not fall under the provisions of this Act.

15 U S C § 1171 et seq.:

§1171. DEFINITIONS

As used in this chapter—

(a) The term "gambling device" means—

(1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any machine or mechanical device designed and manufactured to operate by means of insertion of a coin, token, or similar object and designed and manufactured so that when operated it may deliver, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device.

(b) The term "State" includes Alaska, Hawaii, Puerto Rico, the Virgin Islands, and Guam.

(c) The term "possession of the United States" means any possession of the United States which is not named in subsection (b) of this section. Jan. 2, 1951, c. 1194, § 1, 64 Stat. 1134.

§ 1172. TRANSPORTATION OF GAMBLING DEVICES AS UNLAWFUL; EXCEPTIONS; AUTHORITY OF FEDERAL TRADE COMMISSION

It shall be unlawful knowingly to transport any gambling device to any place in a State, the District of Columbia, or a possession of the United States from any place outside of such State, the District of Columbia, or possession: *Provided*, That this section shall not apply to transportation of any gambling device to a place in any State which has enacted a law providing for the exemption of such State from the provisions of this section, or to a place in any subdivision of a State if the State in which such subdivision is located has enacted a law providing for the exemption of such subdivision from the provisions of this section.

Nothing in this chapter shall be construed to interfere with or reduce the authority, or the existing interpretations of the authority, of the Federal Trade Commission under the Federal Trade Commission Act. Jan. 2, 1951, c. 1194, § 2, 64 Stat. 1134.

§ 1173. REGISTRATION OF MANUFACTURERS AND DEALERS; FILING OF INVENTORY AND SALES AND DELIVERY RECORDS MONTHLY; SALES OF UNASSEMBLED DEVICES; ILLEGAL SALES OR DELIVERIES

Upon first engaging in business, and thereafter on or before the 1st day of July of each year, every manufacturer of and dealer in gambling devices shall register with the Attorney General his name or trade name, the address of his principal place of business, and the addresses of his places of business in such district. On or before the last day of each month every manufacturer of and dealer in gambling devices shall file with the Attorney General an inventory and record of all sales and deliveries of gambling devices as of the close of the preceding calendar month for the place or places of business in the district. The monthly record of sales and deliveries of such gambling devices shall show the mark and number identifying each article together with the name and address of the buyer or consignee thereof and the name and address of the carrier. Duplicate bills or invoices, if complete in the foregoing respects, may be used in filing the record of sales and deliveries. For the purposes of this chapter, every manufacturer or dealer shall mark and number each gambling device so that it is individually identifiable. In cases of sale, delivery, or shipment of gambling devices in unassembled form, the manufacturer or dealer shall separately mark and number the components of each gambling device with a common mark and number as if it were an assembled gambling device. It shall be unlawful for any manufacturer or dealer to sell, deliver, or ship any gambling device which is not marked and numbered for identification as herein provided; and it shall be unlawful for any manufacturer or dealer to manufacture, recondition, repair, sell, deliver, or ship any gambling device without

having registered as required by this section, or with-filing monthly the required inventories and records of sales and deliveries. Jan. 2, 1951, c. 1194, §3, 64 Stat. 1135.

§ 1174. LABELING AND MARKING OF SHIPPING PACKAGES

All gambling devices, and all packages containing any such, when shipped or transported shall be plainly and clearly labeled or marked so that the name and address of the shipper and of the consignee, and the nature of the article or the contents of the packages may be readily ascertained on an inspection of the outside of the article or package. Jan. 2, 1951, c. 1194, § 4, 64 Stat. 1135.

§ 1175. SPECIFIC JURISDICTIONS WITHIN WHICH MANUFACTURING, REPAIRING, SELLING, POSSESSING, ETC., PROHIBITED

It shall be unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gambling device in the District of Columbia, in any possession of the United States, within Indian country as defined in section 1151 of Title 18 or within the special maritime and territorial jurisdiction of the United States as defined in section 7 of Title 18. Jan. 2, 1951, c. 1194, § 5, 64 Stat. 1135.

§ 1176. PENALTIES

Whoever violates any of the provisions of sections 1172-1174 or 1175 of this title shall be fined not more than $5,000 or imprisoned not more than two years, or both. Jan. 2, 1951, c. 1194, § 6, 64 Stat. 1135.

§ 1177. CONFISCATION OF GAMBLING DEVICES AND MEANS OF TRANSPORTATION; LAWS GOVERNING

Any gambling device transported, delivered, shipped, manufactured, reconditioned, repaired, sold, disposed of, received, possessed, or used in violation of the provisions of this chapter shall be seized and forfeited to the United

States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this chapter, insofar as applicable and not inconsistent with the provisions hereof: *Provided,* That such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of gambling devices under this chapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General. Jan. 2, 1951, c. 1194, § 7, 64 Stat. 1135.

Title 28 U.S.C. § 1331

§ 1331. FEDERAL QUESTION; AMOUNT IN CONTROVERSY

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

Title 28 U.S.C. § 2281

§ 2281. INJUNCTION AGAINST ENFORCEMENT OF STATE STATUTE; THREE-JUDGE COURT REQUIRED

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by

restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Office Supreme Court, U.S.
FILED
JUN 4 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 944

HERSHEY MFG. CO., an Illinois Corporation,
Appellant,

vs.

BENJAMIN S. ADAMOWSKI, individually and as State's Attorney of Cook County; JOSEPH D. LOHMAN, individually and as Sheriff of Cook County; TIMOTHY J. O'CONNOR, individually and as Commissioner of Police of the City of Chicago; WILLIAM G. MILOTA, individually and as Bailiff of the Municipal Court of Chicago; and LATHAM CASTLE, Attorney General of the State of Illinois,
Appellees.

On Appeal from the United States District Court
For the Northern District of Illinois.

APPLICATION FOR INJUNCTION PENDING FINAL DETERMINATION ON APPEAL.

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The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

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HERSHEY MFG. CO., an Illinois Corporation,
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Appellees.

On Appeal from the United States District Court
For the Northern District of Illinois.

APPLICATION FOR INJUNCTION PENDING FINAL DETERMINATION ON APPEAL.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court:

Hershey Manufacturing Co., an Illinois corporation, appellant herein, prays that an injunction issue out of this court to restrain appellees from enforcing against appel-

lant the provisions of a statute of the State of Illinois enacted in 1919 entitled "An Act to Protect All Counties in the State of Illinois in which there are United States Naval Stations and Military Posts of the First Class from Slot Machines and Other Gambling Devices", Chap. 38, Ill. Rev. Stat. 1957, §§ 344, *et seq.*, pending the final determination of the cause by the Supreme Court of the United States. Appellant asks that the injunction restrain appellees from enforcing said statute in respect to appellant's business of manufacturing parts and subassemblies of so-called slot machines for shipment in interstate commerce to Nevada and in foreign commerce in compliance with the Johnson Act, 15 U.S.C., §§ 1171 *et seq.* A suggested form of order is attached hereto as Appendix A.

I.

NATURE OF THE CASE.

This is a suit to restrain the enforcement of the aforesaid Illinois Statute on the ground of its alleged repugnancy to the Constitution of the United States. The challenged statute is repugnant to the due process clause of the Fourteenth Amendment in that the words "of the First Class" contained in Section 344 thereof are undefined in the statute, have no common law meaning, have not been previously judicially construed, and such words render the application of the statute vague and uncertain. The statute is repugnant to the Commerce and Supremacy clauses of the Constitution in that insofar as the statute prohibits the manufacture of parts and subassemblies of so-called slot machines for shipment in interstate and foreign commerce and not for use in Illinois it is an attempt on the part of the State of Illinois to regulate a field preempted by Congress through the enactment of the Johnson Act, 15 U.S.C., §§ 1171 *et seq.* The challenged

statute is repugnant to the Commerce clause and the due process clause of the Fourteenth Amendment in that the statute does not represent a legitimate exercise of the police power. It is also believed that the statute is repugnant to the equal protection clause of the Fourteenth Amendment.

Jurisdiction of the United States District Court for the Northern District of Illinois was invoked under Title 28 U.S.C., § 1331, and a district court of three judges was convened pursuant to the provisions of Chap. 28 U.S.C., §§ 2281 and 2284.

II.

JURISDICTION.

The jurisdiction of the Supreme Court to review this case on appeal rests upon 28 U.S.C., § 1253. Appellant has filed its jurisdictional statement. Jurisdiction to issue the injunction requested is an inherent power of this Court, and is recognized in Rule 62 g of the Federal Rules of Civil Procedure. An application for an injunction pending the final determination of the cause by the Supreme Court of the United States was made to the district court of three judges below and denied on April 14, 1959, the circuit judge assigned to the district court dissenting. An application for an injunction pending the final determination was made to the circuit justice, the Honorable Tom C. Clark, Associate Justice of the Supreme Court, prior to the filing of the jurisdictional statement and docketing of the case on appeal and was denied by him on April 24, 1959. Appellant has not made application to any other justice.

III.

THE RULING BELOW AND THE REASON FOR APPEAL.

The district court of three judges below, the circuit judge dissenting, held that it lacked jurisdiction to grant the relief requested and dismissed the complaint as amended on motions of the defendants, stating that "the single statute challenged in this complaint would seem to violate the due process clause of the Fourteenth Amendment of the United States Constitution" and that "the Illinois Supreme Court has not yet so interpreted it", and that the complaint "asks a decision on the merits concerning unresolved questions of state law and questions of constitutional law never before decided by the state Supreme Court", and although finding that the complaint presents a substantial federal question "for a single district judge" held that the complaint does not present a substantial "constitutional claim". The court also held that even if it did have jurisdiction plaintiff was not properly in equity since no immediate and irreparable harm will occur to the plaintiff if the court "does not proceed". The court said that "plaintiff has many adequate remedies at law". The dissenting judge said that the district court had jurisdiction citing *Doud* v. *Hodge*, 350 U.S. 485. This decision appears to be in direct conflict with the holding of this court in *Doud* v. *Hodge*, 350 U.S. 485, *Toomer* v. *Witsell*, 334 U.S. 385, and other cases cited in the jurisdictional statement, and it presents important questions of federal jurisdiction.

IV.

REASONS FOR REQUESTING INJUNCTION.

Appellant and its corporate predecessor had manufactured, among other things, parts and subassemblies for slot machines in Chicago, Illinois, for more than forty

years without state interference. With respect to that phase of its business relating to gambling devices appellant manufactures only parts and subassemblies of slot machines intended for shipment to Nevada, where the assembly and use of slot machines is lawful, and to foreign countries, and appellant has complied with the provisions of the Johnson Act, 15 U.S.C. §§ 1171 *et seq.* This suit was precipitated by seizures of appellant's subassemblies and parts of slot machines which were in the custody of Transworld Airlines, an interstate freight carrier, enroute to Nevada, and located at Midway Airport in Chicago, Illinois and seizure of other parts and subassemblies of slot machines manufactured on order for shipment to Nevada, but still located at appellant's factory in Chicago, Illinois, and threatened further seizures, all pursuant to the challenged statute. A temporary restraining order was issued by the emergency motion judge in summer vacation pursuant to the provisions of Title 28 U.S.C. § 2284(3), after taking evidence and upon findings that irreparable injury would otherwise result to plaintiff's property and business. After the memorandum and order of the court below on February 9, 1959 dismissing the suit, the court of three judges enjoined enforcement of the challenged Act pending the determination of a motion to vacate the order of dismissal, to deny the motions to dismiss and to enjoin enforcement of the challenged statute. The motion to vacate was denied on April 14, 1959. The temporary injunction was dissolved and the court below, the circuit judge dissenting, refused to grant a restraining order pending either final determination of the case by the Supreme Court of the United States or pending application to an individual justice of this Court. Judge Campbell, one of the district judges, stated that he was opposed to any extension at all. He said "I think the protection of this court has been extended without any

authority long enough. I see no reason for extending it further." Judge Hoffman, the other district judge, stated "I am in accord with that. I don't think that the damage under this particular statute is or might be extraordinary or irreparable. I don't think I share your views that this company will be put out of business as a result of this statute."

Judge Campbell then stated: "No such irreparable harm can occur within the short time in which you could go to Justice Clark if you want to. I don't think the State's Attorney physically could ruin your business within a week even if he wanted to. I think, as I say, the protection of this court has been extended without any authority at all entirely too long and I see no great irreparable harm in this type of business. I am against any extension at all."

Thereafter, on April 15, 1959, and within 24 hours of the denial of the request for a temporary injunction pending appeal or pending application to this Court (which was by the two district judges, the circuit judge dissenting) the defendant State's Attorney's police arrested Louis F. Urban, the president of the plaintiff corporation, on a charge of violating the challenged statute upon an information, and in a search purportedly incident to his arrest seized patterns, parts and books and records of plaintiff pertaining not only to the manufacture of parts and subassemblies of gambling devices, but other phases of plaintiff's business not related in any way to gambling devices.

Since said date plaintiff has ceased the manufacture of parts and subassemblies of slot machines, has laid off 28 employees engaged in such manufacture and has been unable to fill orders received from the State of Nevada and foreign countries. Further, the United States Armed

Forces have determined that slot machines can be used overseas and appellant has been unable to compete in the market for such slot machine parts and sub assemblies thus created. See Supporting Affidavit with Exhibits attached, Appendix B hereto.

On May 19, 1959, in *People of the State of Illinois* v. *Buckley Manufacturing Co., a corporation, and Hubert Buckley,* Nos. 58 MC 36047 and 58 MC 32040 respectively, in the Municipal Court of Chicago, Judge Alexander J. Napoli of the Municipal Court of Chicago held that the statute here challenged is vague, indefinite and unconstitutional and granted defendants' motions to quash or dismiss the informations or complaints. Nevertheless appellees continue to threaten to enforce said statute against appellant and appellant has been irreparably injured and is continuing to be irreparably injured, and will continue to be irreparably injured unless a temporary injunction restraining appellees from enforcing said unconstitutional statute is issued by this Court.

The issuance of such injunction cannot injure the defendants.

Wherefore appellant prays that this Court enjoin the enforcement of said statute and the destruction of the property heretofore seized pending a final determination of this cause.

Respectfully submitted,

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Chicago, Ill.
JOHN J. YOWELL.
G. KENT YOWELL
29 S. LaSalle St.,
Chicago 3, Ill.
Counsel for Appellant

APPENDIX "A".

(Suggested Form of Order)

IN THE SUPREME COURT OF THE UNITED STATES
October Term, A. D. 1958

HERSHEY MANUFACTURING CO., an Illinois corporation,
Appellant,

vs.

BENJAMIN S. ADAMOWSKI, individually and as State's Attorney of Cook County, JOSEPH D. LOHMAN, individually and as Sheriff of Cook County, TIMOTHY J. O'CONNOR, individually and as Commissioner of Police of the City of Chicago, WILLIAM G. MILOTA, individually and as Bailiff of the Municipal Court of the City of Chicago, and LATHAM CASTLE, Attorney General of the State of Illinois,
Appellees.

No. 944

Whereas the appellant has applied for an injunction restraining the appellees during the pendency of this cause and until its final determination or until otherwise ordered from in any way enforcing the provisions of a statute of the State of Illinois entitled "An Act to Protect all Counties in the State of Illinois in which there are United States Naval Stations and Military Posts of the First Class from Slot Machines and other Gambling Devices", Chap. 38, Ill. Rev. Stat. 1957 § 344, *et seq*, with respect to appellant's business of manufacturing parts and subassemblies of so-called slot machines for shipment to the State of Nevada and foreign countries, and

Whereas, without such injunction appellant is in immediate danger of suffering irreparable injury and the granting of such injunction will not injure appellees and such injunction will maintain the status quo;

Now, Therefore, It Is Ordered by the Court that the prayer for injunction pending the appeal in this Court until the same is finally disposed of, or until the Court orders to the contrary, be, and the same is hereby granted.

Therefore it is ordered that an injunction be and the same is hereby directed to issue restraining Benjamin S. Adamowski, State's Attorney of Cook County, Joseph D. Lohman, Sheriff of Cook County, Timothy J. O'Connor, Commissioner of Police of the City of Chicago, William G. Milota, Bailiff of the Municipal Court of the City of Chicago, and Latham Castle, Attorney General of the State of Illinois, appellees herein, their agents, servants and attorneys, and each and all of them severally and as a body, from enforcing the provisions of a statute of the State of Illinois entitled "An Act to Protect all Counties in the State of Illinois in which there are United States Naval Stations and Military Posts of the First Class from Slot Machines and Other Gambling Devices", Chap. 38, Ill. Rev. Stat. 1957, §344, et seq, against appellants business of manufacturing parts and subassemblies of so-called slot machines for delievery in interstate commerce and foreign commerce in compliance with the Johnson Act, Title 15, U.S.C. §1171, et seq., and the injunction thus directed to be issued to remain in full force and effect until the final decision of this Court or until the same is modified or changed by some further order.

Appendix B

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

LOUIS F. URBAN, being duly sworn on oath, says that he has read the foregoing application for an injunction; that he is familiar with the matters relating to appellant's business, the seizures of merchandise and records and his arrest therein described, and with respect to all of said matters the allegations are true in substance and in fact.

Affiant further states that Jennings & Company, a division of Hershey Manufacturing Company, plaintiff herein, has received orders for parts and subassemblies of so-called slot machines for delivery to armed forces installations overseas, which orders cannot be filled by reason of appellees' continued threats of seizures of appellant's manufactured products.

Affiant further states that copies of some of the orders received are attached hereto as exhibits.

Further affiant saith not.

Louis F. Urban

SUBSCRIBED AND SWORN to before me this 1st day of June, A. D. 1959.

Lillian J. Vance
Notary Public.

FORM SP1003

Purchase Order

MAR 3 19

THIS NUMBER MUST APPEAR ON ALL INVOICES, PKGS., & CORRESPONDENCE RELATIVE TO THIS SHIPMENT.
NO. 01811

FROM: mat-matic Incorporated — 1009 E. Baltimore St., Baltimore 2, Md.

TO: JENNINGS & CO.
4309 W. LAKE ST.
CHICAGO, ILLINOIS

EAstern 7-5745 & 7-5746

Freight Lines Nly.

DATE MAR. 2, 59 WHEN SHIP IMMEDIATELY VIA CHICAGO EXPR... OUTLET

SHIP TO W. J. BYRNES & CO.
25 BROADWAY BY NY
FOR EXPORT TO .
W.C.C. CLUB
DET 30, TUSLOG
ADANA, TURKEY

New Pier

QUANTITY	NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
2	5A / 25A	ELDORADO BUCKAROOS 4 REEL GOMB. 5000-1	642.00 Ea	1284 00
		GLASS TO READ 4 BUCKAROOS $125.00 GUARANTEED		15 00
		JACKPOT IMPRINTED BELOW THE INDIAN HEAD		1299.00
		WITH LIGHTS 220V 50 CYCKES		6 00
		PLUS $7.50 EACH FOR SPEC. TERM.		
		LESS $25 EA FOR G.T. JP		125 00
				312 75
		LESS 25%		938.25

IN THE BODY OF THE BILL OF LADING WRITE PHONE WHITEHALL 3-4740 FOR DELIVERY INSTRUCTIONS.

JSB.

(signed) OK

NOTE- DUE TO THE SPECIAL REQUIREMENTS AND URGENCIES OF THE EXPORT TRADE, WE MUST INSIST ON YOUR IMMEDIATE ACKNOWLEDGEMENT OF THIS PURCHASE ORDER. PLEASE FORWARD ENCLOSED REPLY CARD AT ONCE.

FORM (FMB)

Purchase Order

THIS NUMBER MUST APPEAR ON ALL INVOICES, PKGS., & CORRESPONDENCE RELATIVE TO THIS SHIPMENT.

NO 01956

FROM: Mat-Matic Corporation — 1009 E. Baltimore St., Baltimore 2, Md.

EAstern 7-5745 & 7-5746

APR 3 - 1959

SOLD TO: JENNINGS & CO.
4309 N. LAKE ST.
CHICAGO, ILLINOIS

DATE: MARCH 30, 59 WHEN SHIP: IMMEDIATELY VIA: AIR FREIGHT COLLECT
INSURE IN THE AMOUNT OF LIST PRICE:

SHIP TO:
PIONEER R.C.O. OPNS. WEAS
640th ACW SQDN.
c/o S/SGT. CARL J. HUGHES, SECRET'RY
WARNOR AIR FORCE BASE
STEPHENVILLE, NEWFOUNDLAND

QUANTITY	NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
		PLEASE SHIP THE ABOVE VIA TRANS CANADA AIR LINES CO. OF CHICAGO. THE FREIGHT IS TO BE COLLECT AND INSURE IN AMOUNT OF LIST PRICE		
1		BUCKAROO CHIEF 4-REELER WITH LIGHTS 110V-60-CYCLES 5¢ MODEL 5000 to 1 JACKPOT COMBINATION, WITH FULL DISCRIPTION OF JACKPOTS PAID, HOW MUCH ETC. GUARANTEED JACKPOT	771 00	
1		STAR CHIEF WITH MULTIPLE JACKPT COMBINATION 10¢ MODEL WITH FULL DISCRIPTION OF JACKPOTS PAID, HOW MUCH ETC. WITH LIGHTS 110V 60-CYCLES GUARANTEED JACKPOT	670 00	
			1441 00	
		LESS 3 1/2% EQ FREIGHT IP	50 00	
		LESS 25%	1391 00	
			347 75	
			1043 25	

JS Buffaloe

Disc.

P.O. 01672

NOTE— DUE TO THE SPECIAL REQUIREMENTS AND URGENCIES OF THE EXPORT TRADE, WE MUST INSIST ON YOUR IMMEDIATE ACKNOWLEDGMENT OF THIS PURCHASE ORDER. PLEASE FORWARD ENCLOSED REPLY CARD AT ONCE.

FORM 4

Purchase Order

APR 23 1959

THIS NUMBER MUST APPEAR ON ALL INVOICES, PKGS., & CORRESPONDENCE RELATIVE TO THIS SHIPMENT.
NO. 00184

FROM Mercantile Incorporated
1009 E. Baltimore St.,
Baltimore 2, Md.

TO JENKINS & CO.
4309 W. LAKE ST.
CHICAGO, ILLINOIS

EAstern 7-5745 & 7-5746

Motor Freight - Collect

DATE APRIL 21, 1959 WHEN SHIP IMMEDIATELY VIA ~~CHICAGO EXPRESS FOR COLLECT~~

SHIP TO N.J. JENKINS & CO.
25 BROADWAY NY 5Y
FOR EXPORT TO
N.C.O. OPEN MESS
ROYAL AIR FORCE KIRKNEWTON
U.S.A.F., MIDLOTHIAN, SCOTLAND

QUANTITY	NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
2		SUPER DELUXE STAR CHIEF EX (2 SHILLING) 80-20		
		WITH LIGHTS GUARANTEED JACKPOT 230V 50-C.		
2		SUPER DELUXE STAR CHIEF (1 SHILLING) 80-20		
		WITH LIGHTS GUARANTEED JACKPOT 230V 50-C		
2		SUPER DELUXE STAR CHIEF (6 PENCE) 80-20		
		WITH LIGHTS GUARANTEED JACKPOT 230V 50-C		
		MASTER KEY BACK DOOR & CASH BOXES (ALL KEYED AL		

IN THE BODY OF THE CHICAGO EXPRESS BILL OF LADING WRITE: PHONE WHITEHALL 3-4760 FOR DELIVERY INSTRUCTIONS.

JSB

H.O. 01674
01671
issued

NOTE- DUE TO THE SPECIAL REQUIREMENTS AND URGENCIES OF THE EXPORT TRADE, WE MUST INSIST ON YOUR IMMEDIATE ACKNOWLEDGEMENT OF THIS PURCHASE ORDER. PLEASE FORWARD ENCLOSED REPLY CARD AT ONCE.

FORM 57HB

Purchase Order

THIS NUMBER MUST APPEAR ON ALL INVOICES, PKGS., & CORRESPONDENCE RELATIVE TO THIS SHIPMENT.
NO. C0225

FROM: [redacted] 1009 E. Baltimore St., Baltimore 2, Md.

TO: JENKINGS & CO.
4309 W. LAKE ST.
CHICAGO, ILLINOIS

EAstern 7-5745 & 7-5746

DATE IMMEDIATELY WHEN SHIP APR. 28,59 VIA [redacted] WILL ADVISE NAME OF FREIGHT CO. NEXT P.O.

SHIP TO TOKYO CIVILIAN OPER MISS
APO 94, P.M. SAN FRANCISCO. CALIF.

QUANTITY	NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
1		5¢ STAR CHIEF WITHOUT LIGHTS GUARANTEED JP 80-82%	632 00	
1		5¢ BUCKAROO FC LIGHTS GUARANTEED JP 80-82%	746 00	
		THEY WANT A 37.50 GUARANTEED JP CARD ON EACH. CHINE	1378 00	
		JUDGE BUCKAROO ACCORDINGLY.	50 00	
		ATTACHED FIND COIN USED BY THE CUSTOMER.	LESS 2½% DR for CT	
		LESS 25%.	13	8,94
		PARCEL POST-SPECIAL HANDLING. THIS CUSTOMER IS BUILDING A NEW CLUB AND WILL REQUIRE ANOTHER 25 MACHINES WITHIN THE NEXT SIX MONTHS. IT IS IMPERATIVE THAT THESE MACHINES ARRIVE WITHOUT DAMAGE AS THIS IS OUR FIRST ORDER. IF NEED BE PLEASE CONSULT A PACKING CO. AND TO ENSURE PROPER PACKING. IF THESE MACHINES ARRIVE DAMAGED, THERE GOES OUR CHANCES. PLEASE HELP US.	33	2 00
			9%	6.00

JOE.

H 0 1672

NOTE - DUE TO THE SPECIAL REQUIREMENTS AND URGENCIES OF THE EXPORT TRADE, WE MUST INSIST ON YOUR IMMEDIATE ACKNOWLEDGEMENT OF THIS PURCHASE ORDER. PLEASE FORWARD ENCLOSED REPLY CARD AT ONCE.

FORM SPMP

Purchase Order 8 1959

THIS NUMBER MUST APPEAR ON ALL INVOICES, PKGS., & CORRESPONDENCE RELATIVE TO THIS SHIPMENT.
NO. C0310

FROM: W. J. BYRNES & CO.
1009 E. Baltimore St.,
Baltimore 2, Md.

TO: JENKINS & CO.
A309 W. LAKE ST.
CHICAGO, ILLINOIS

EASTERN 7-5745 & 7-5746

M.T. FOR FREIGHT COLLECT

DATE MAY 6, 59 WHEN SHIP IMMEDIATELY VIA ~~CHGS GO SEP BSS COLLECT~~

SHIP TO W. J. BYRNES & CO.
25 BROADWAY NY NY
FOR EXPORT TO
TRANSPORTATION OFFICER ISKENDRUN
~~FOR: ENGINEER H.Q.U.S. OFSP USCO~~
TUSLOG DET. 10
ISKENDRUN, TURKEY

QUANTITY	NUMBER	DESCRIPTION	UNIT PRICE		AMOUNT
2		5~~0~~ BUCKAROOS WITHOUT LIGHTS GUAR JP NAME GLASS TO READ 325 #3 COMB.	746	Ea	1492.00
2		10~~0~~ BUCKAROOS WITHOUT LIGHTS GUAR JP NAME GLASS TO READ 350 #3 COMB.	757	Ea	1514.00
2		25~~0~~ BUCK-ROOS WITHOUT LIGHTS GU R JP NAME GLASS TO ~~READ~~ READ 1125.00 #3 COMB.	769	Ea	1538.00
					4544.00
		LESS 25 EA F.O.T.			150.00
					4394.00
		LESS 25%			1098.50
					3295.50

IN THE BODY OF THE BILL OF LADING WRITE: PHONE WHITEHALL 3-4740 FOR DELIVERY INSTRUCTIONS.

Joe.

40 2155

NOTE- DUE TO THE SPECIAL REQUIREMENTS AND URGENCIES OF THE EXPORT TRADE, WE MUST INSIST ON YOUR IMMEDIATE ACKNOWLEDGEMENT OF THIS PURCHASE ORDER. PLEASE FORWARD ENCLOSED REPLY CARD AT ONCE.

FORM 9-1955

Purchase Order

MAY 8 1959

THIS NUMBER MUST APPEAR ON ALL INVOICES, PACK.., & CORRESPONDENCE RELATIVE TO THIS SHIPMENT.
NO. C0311

FROM: mel-matic incorporated
1009 E. Baltimore St.,
Baltimore 2, Md.

EAstern 7-5745 & 7-5746

TO: JENNINGS & CO.
4309 W. LAKE ST.
CHICAGO, ILLINOIS

DATE MAY 6, 1959 WHEN SHIP SEE INSTRUCTIONS VIA ~~CHICAGO EXPRESS COLLECT~~ Motorfreight Collect

SHIP TO W. J. BYRNES & CO.
25 BROADWAY NY NY
FOR EXPORT TO
N.C.O. OPEN MESS ECH 1712
METZ, FRANCE (US ARMY)

QUANTITY	NUMBER	DESCRIPTION	UNIT PRICE		AMOUNT	
2		5f SUN CHIEFS NO LIGHTS GUARANTEED JP	585	00 EA	1170	00
1		10f " " " " " "	599	00	599	~~00~~
		LESS 25% DISCOUNT			1769	~~00~~
		LESS 25% DISC			73	~~00~~
					1696	~~00~~
					423	50
		THIS ORDER NOT BE PROCESSED UNTIL WE GIVE YOU THE WORD. THIS IS FOR AN ARMY CLUB AND THEY DO NOT HAVE AUTHORIZATION TO PURCHASE AS OF THIS TIME WHEN AUTHORIZATION COMES PLEASE SHIP AS SOON AS POSSIBLE.			1270	50
		We Will Tell You When				
		DO NOT PROCESS THIS ORDER				
		DO NOT PROCESS THIS ORDER.				

JSB

Write up Order and Take
" " HOLD

1270.01 19

NOTE— DUE TO THE SPECIAL REQUIREMENTS AND URGENCIES OF THE EXPORT TRADE, WE MUST INSIST ON YOUR IMMEDIATE ACKNOWLEDGEMENT OF THIS PURCHASE ORDER. PLEASE FORWARD ENCLOSED REPLY CARD AT ONCE.

FORM 07X3B

Purchase Order

MAY 11 1959

THIS NUMBER MUST APPEAR ON ALL INVOICES, PKGS., & CORRESPONDENCE RELATIVE TO THIS SHIPMENT.

NO. C0303

FROM: mat-matic Incorporated — 1009 E. Baltimore St., Baltimore 2, Md.

EAstern 7-5745 & 7-5746

TO: JENKINS & CO.
A309 N. LAKE ST.
CHICAGO, ILLINOIS

DATE XXXXX 5-8-59 WHEN SHIP IMMEDIATELY VIA INTERST TE MOTOR LINES COLLECT XXXXXXXXXXXXXXXXXXXX

SHIP TO W. J. STENES & CO. INC.
25 BROADWAY, NY
FOR EXPORT TO:
EMILY CLUB
U.S.A.F.
R.A.F. STATION STRUBY, ENGLAND

QUANTITY	NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
1		SKIPPER SUPER DELUXE STAR CHIEF WITH LIGHTS		670 00
2		ONE SHILLING SUPER DELUXE STAR CHIEF WITH LIGHTS	695.00	1390 00
1		TWO SHILLING SUPER DELUXE STAR CHIEF WITH LIGHTS		877 00
		ALL GUARANTEED JACKPOTS 80/20 VOLTAGE 220V		2937 00

IN THE BODY OF THE CHICAGO EXPRESS BILL OF LADING WRITE: PHONE WHITEHALL 3-4740 FOR DELIVERY INSTRUCTIONS.

JSB

EXPORT BOX SIZE 31x22x21
135 lbs each

#0117

NOTE- DUE TO THE SPECIAL REQUIREMENTS AND URGENCIES OF THE EXPORT TRADE, WE MUST INSIST ON YOUR IMMEDIATE ACKNOWLEDGEMENT OF THIS PURCHASE ORDER. PLEASE FORWARD ENCLOSED REPLY CARD AT ONCE.

1

FORM 57459

Purchase Order

MAY 11 1959

THIS NUMBER MUST APPEAR ON ALL INVOICES, PKGS., & CORRESPONDENCE RELATIVE TO THIS SHIPMENT.

NO. 06323

FROM: Metzmetts Correspondence

1009 E. Baltimore St., Baltimore 2, Md.

EAstern 7-5745 & 7-5746

TO: JENNINGS & CO.
4309 W. LAKE ST.
CHICAGO, ILLINOIS

DATE MAY 8, 1959 WHEN SHIP IMMEDIATELY VIA INTERSTATE MOTOR LINES COLLECT

SHIP TO V. J. BYRNES & CO.
25 BROADWAY NY NY
FOR EXPORT TO
OFFICERS OPEN MESS
CAMP DES LOGES
ST. GERMAIN EN LAY, FRANCE

QUANTITY	NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
1		5¢ SUPER DELUXE STAR CHIEF NO LIGHTS GUAR JP	632 50	
1		5¢ " " " " " " " "	852 00	
			1484 50	
		LESS 25% FAGTJP	434 50	
		THESE PEOPLE HAVE PURCHASED MACHINES BEFORE PLEASE CHECK TO SEE IF I HAVE RECEIVED A NO P.O. PERMIT NO		
		LESS 25% DISC	358 50	
			1075 50	

IN THE BODY OF THE BILL OF LADING WRITE UPON ARRIVAL IN NEW YORK PHONE WHITEHALL 3-4740 FOR DELIVERY INSTRUCTIONS.

JSB.

CRATE SIZE 31x22x21
WEIGHS 135 lbs

PO 11761

NOTE— DUE TO THE SPECIAL REQUIREMENTS AND URGENCIES OF THE EXPORT TRADE, WE MUST INSIST ON YOUR IMMEDIATE ACKNOWLEDGEMENT OF THIS PURCHASE ORDER. PLEASE FORWARD ENCLOSED REPLY CARD AT ONCE.

#1

MAY 18 1959

Purchase Order

THIS NUMBER MUST APPEAR ON ALL INVOICES, PKGS., & CORRESPONDENCE RELATIVE TO THIS SHIPMENT.

NO. 00551

FROM: [illegible]

1009 E. Baltimore St.,
Baltimore 2, Md.

EAstern 7-5745 & 7-5746

TO: JENNINGS & CO.
4309 N. LAKE ST.
CHICAGO, ILLINOIS

DATE MAY 14, 1959 WHEN SHIP SEE INSTRUCTIONS VIA SEE INSTRUCTIONS

SHIP TO HIT PARADE G.M.B.H.
PALMENSTEIN/TAUNUS, GERMANY

KEY BD TSM CB TION

QUANTITY	NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
40	ROSE PLASTIC	5¢ SUPER DELUXE JENNINGS SLANT TOP [illegible] No LIGHTS	515 ⁰⁰	
20	" "	10¢ " " " " " " "	577 ⁰⁰	
15	" "	25¢ " " " " " " "	615 ⁰⁰	
1		25¢ SPARE PARTS KIT 118.14		
1		10¢ SPARE PARTS KIT 118.14	LESS 20% DISCOUNT	
1		5¢ SPARE PARTS KIT 118.14		
		AUTOMATIC JACKPOT [illegible] SLUG-OFF		
		ALL MACHINES HAVE 4 REELS 80-20% PAY LIGHTS		
		FOR ADDITIONAL INSTRUCTIONS SEE FOLLOW (5) 25¢ MACHINES		
		(2) 10¢ 4 CHUTES AND (15) 5¢ MACHINES TO BE READY FOR [illegible]		
		WITHIN SEVEN DAYS AFTER USE OF SLOT MACHINES BY THE ARMY AND [illegible]		
		BEEN AUTHORIZED. BALANCE TO BE READY FOR SHIPMENT WITHIN [illegible]		
		LATER THAN THREE WEEKS AFTER PUBLICITY IS RELEASED AS ABOVE. THIS ORDER IS VALID ONLY AFTER DIRECTIVE AUTHORIZING OPERATION OF SLOT MACHINES HAS BEEN ISSUED BY THE ARMY.		

5/13/59 OK X Pelaar

THIS IS NOT AN ORDER UNTIL ARMY AUTHORIZES USE OF MACHINES. WE WILL NOTIFY YOU BY TELEGRAM WHEN ORDER.

IS THAT TO KNOW NOW IF YOU CAN MEET THE ABOVE REQUIREMENTS. PLEASE REPLY

JSB.

NOTE— DUE TO THE SPECIAL REQUIREMENTS AND URGENCIES OF THE EXPORT TRADE, WE MUST INSIST ON YOUR IMMEDIATE ACKNOWLEDGEMENT OF THIS PURCHASE ORDER. PLEASE FORWARD ENCLOSED REPLY CARD AT ONCE.

FORM 97H83

Purchase Order

20 1959

THIS NUMBER MUST APPEAR ON ALL INVOICES, PKGS., & CORRESPONDENCE RELATIVE TO THIS SHIPMENT.
NO. #1

FROM: [illegible] 1009 E Baltimore St., Baltimore 2, Md.

EAstern 7-5745 & 7-5746

TO: JENNINGS & CO.
4309 N. LAKE ST.
CHICAGO, ILLINOIS

DATE MAY 18, 1959 WHEN SHIP SEE BELOW VIA INTERSTATE MOTOR LINES COLL.

SHIP TO W. J. BYRNES & CO.
25 BROADWAY AT NY
FOR EXPORT TO
HOTEL COLUMBIA
JAGDSTR 8 (U.S. ARMY)
MUNICH 19, GERMANY

QUANTITY	NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
1		5¢ JENNINGS ELDORADO SUN CHIEF GREEN PANEL GUAR JP		
1		5¢ " " STAR CHIEF RED PANEL DROP JP		
1		10¢ " " SUN CHIEF GREEN PANEL GUAR. JP.		
1		10¢ " " BUCKAROO RED PANEL DROP JP		
1		25¢ " " SUN CHIEF RED PANEL DROP JP		
1		NO LIGHTS 3-REELERS 90/20 4-REELER 82/18		
		USE YOUR JUDGEMENT ON BUCKAROO CC18.		
		THIS IS AN ARMY ORDER AND YOU ARE NOT TO SHIP UNTIL APPROVAL IS RECEIVED. WE WILL TELL YOU WHEN TO SHIP		

IN THE BODY OF THE INTERSTATE MOTOR LINES BILL OF LADING WRITE UPON ARRIVING IN NEW YORK PHONE WHITEHALL 3-4740 FOR DELIVERY INSTRUCTIONS.

JSB.

NOTE- DUE TO THE SPECIAL REQUIREMENTS AND URGENCIES OF THE EXPORT TRADE, WE MUST INSIST ON YOUR IMMEDIATE ACKNOWLEDGEMENT OF THIS PURCHASE ORDER. PLEASE FORWARD ENCLOSED REPLY CARD AT ONCE.

FORM 9-882

Purchase Order

MAY 20 1959

THIS NUMBER MUST APPEAR ON ALL INVOICES, PKGS., & CORRESPONDENCE RELATIVE TO THIS SHIPMENT.
NO. C0360

FROM: mathematic enterprises — 1009 E. Baltimore St., Baltimore 2, Md.

EAstern 7-5745 & 7-5746

TO: JENNINGS & CO.
4309 N. LAKE ST.
CHICAGO, ILLINOIS

CHANGE NOTICE 5/21/59 LFU
CALL MR BRENNER PRIOR TO SHIPPING

DATE MAY 19, 1959 WHEN SHIP SEE BELOW VIA ~~INTERSTATE MOTOR FRT LINES COM.~~

SHIP TO W.J. BYRNES & CO.
~~25 BRD-WAY NY NY~~
FOR EXPORT TO
OFFICERS & CIVILIAN DEPENDENTS
U.S. ARMY EDN 286
MUNICH, GERMANY

AIR CARGO PREPAID
SEABOARD WESTERN

QUANTITY	NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
2		5¢ ELDORADO SUN CHIEFS		
1		5¢ ELDORADO BUCKAROO		
0 2		~~10¢ ELDORADO SUN CHIEFS~~		
1		10¢ ELDORADO BUCKAROO		
1 2		25¢ ELDORADO SUN CHIEFS		
1 1		25¢ ELDORADO BUCKAROO		
		PLEASE ASSORT THE PANEL COLORS		
		~~[illegible]~~ GUARANTEED JACKPOTS		
		SUN CHIEFS 80/20 BUCKAROO 82/18 USE DISCRETION		
		ON BUCKAROO REEL COMBINATIONS NO LIGHTS		

IN THE BODY OF THE BILL OF LADING WRITE: UPON ARRIVAL IN NEW YORK PHONE WHITEHALL 3-4740 FOR DELIVERY INSTRUCTIONS

(NOTE) THIS IS AN ARMY ORDER. YOU ARE NOT TO SHIP UNTIL WE RECEIVE O'KAY. JSB.

NOTE- DUE TO THE SPECIAL REQUIREMENTS AND URGENCIES OF THE EXPORT TRADE, WE MUST INSIST ON YOUR IMMEDIATE ACKNOWLEDGEMENT OF THIS PURCHASE ORDER. PLEASE FORWARD ENCLOSED REPLY CARD AT ONCE.

(FORM 57182)

Purchase Order

MAY 20 1955

THIS NUMBER MUST APPEAR ON ALL INVOICES, PKGS., & CORRESPONDENCE RELATIVE TO THIS SHIPMENT.

NO. 00367

FROM: [illegible]

1009 E. Baltimore St.
Baltimore 2, Md.

EAstern 7-5745 & 7-5746

TO: JENNINGS & CO.
4339 N. LAKE ST.
CHIC GO, ILLINOIS

DATE MAY 19, 1955 WHEN SHIP SEE BELOW VIA INTERST TE MOTOR FAT LINES C LL.

SHIP TO T.J.BYRNES & CO.
25 BROADWAY NY NY
FOR EXPORT TO
KALB CLUB US ARMY
(JOHNSON BARRACKS
FURTH-NURNBURG, GERMANY

QUANTITY	NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
6		5¢ SUPER DELUXE SUN CHIEFS		
6		10¢ SUPER DELUXE SUN CHIEFS		
5		25¢ SUPER DELUXE STAR CHIEFS		
		GUARANTEED JACKPOTS NO LIGHTS		
		~~XXXXXXX~~ 80/20		

IN THE BODY OF THE BILL OF L DING .RITE: UPON REACHING NEW YORK PHONE .HITEHALL 3-4740 FOR DELIVERY INSTRUCTIONS.

PLEASE NOTE: THIS IS AN ARMY ORDER AND IS NOT TO BE SHIPPED UNTIL WE RECEIVE APPROVAL. WE WILL TELL YOU WHEN TO SHIP THIS ORDER.

NOTE- DUE TO THE SPECIAL REQUIREMENTS AND URGENCIES OF THE EXPORT TRADE, WE MUST INSIST ON YOUR IMMEDIATE ACKNOWLEDGEMENT OF THIS PURCHASE ORDER. PLEASE FORWARD ENCLOSED REPLY CARD AT ONCE.

FORM STMD

Purchase Order

MAY 20 19[illegible]

THIS NUMBER MUST APPEAR ON ALL INVOICES, PKGS., & CORRESPONDENCE RELATIVE TO THIS SHIPMENT.
NO. 10371

FROM [redacted]

1009 E. Baltimore St.,
Baltimore 2, Md.

EAstern 7-5745 & 7-5746

TO: JENNINGS & CO.
430? N. LAKE ST.
CHICAGO, ILLINOIS

DATE MAY 19, 1959 WHEN SHIP SEE BELOW VIA INTERSTATE MOTOR FRT COLLECT

SHIP TO W.J. BYRNES CO.
25 BROADWAY NY NY
FOR EXPORT TO
24th INF. DIV. A.C.O. & OPN MESS
AUGSBURG, GERMANY

QUANTITY	NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
20		5¢ ELDOR/DO SUN CHIEFS Light ?		
15		10¢ " " "		
15		25¢ " " "		
		ALL DROP JACKPOTS 80-20 ASSORTED PANEL COLORS		

IN THE BODY OF THE BILL OF LADING WRITE PHONE WHITEHALL 3-4740 FOR DELIVERY INSTRUCTIONS UPON RE CHING NEW YORK

NOTE: THIS IS AN ARMY ORDER AND IS NOT TO BE PROCESSED UNTIL WE TELL YOU.

NOTE- DUE TO THE SPECIAL REQUIREMENTS AND URGENCIES OF THE EXPORT TRADE, WE MUST INSIST ON YOUR IMMEDIATE ACKNOWLEDGEMENT OF THIS PURCHASE ORDER. PLEASE FORWARD ENCLOSED REPLY CARD AT ONCE.

FORM 51383

Purchase Order

MAY 20 1959

THIS NUMBER MUST APPEAR ON ALL INVOICES, PKGS., & CORRESPONDENCE RELATIVE TO THIS SHIPMENT.
NO. 60370

FROM [redacted]

1009 E. Baltimore St.,
Baltimore 2, Md.

EAstern 7-5745 & 7-5746

TO JENNINGS & CO.
4329 N. LAKE ST.
CHICAGO, ILLINOIS

DATE MAY 19, 1959 WHEN SHIP SEE BELOW VIA INTERST TE MOTOR FRT COLLECT

SHIP TO A.J. BYRNES CO.
25 BROADWAY NY NY
FOR EXPORT TO
N.C.O. CLUB (MONTEITH) & ANNEXES
NUREMBURG, GERMANY

QUANTITY	NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
8		5¢ JENNINGS SIN CHIEFS GUAR JP NO LITE 80-20		
8		10¢ " " " " " " " " "		
6		25¢ JENNINGS STR CHIEF GUAR JP NO LIGHT 80-20		

IN THE BILL OF LADING WRITE PHONE WHITEHALL 3-4740 FOR DELIVERY INSTRUCTIONS UPON RELEASING NEW YORK

NOTE: THIS IS AN ARMY ORDER AND IS NOT TO BE PROCESSED UNTIL WE TELL YOU.

NOTE- DUE TO THE SPECIAL REQUIREMENTS AND URGENCIES OF THE EXPORT TRADE, WE MUST INSIST ON YOUR IMMEDIATE ACKNOWLEDGEMENT OF THIS PURCHASE ORDER. PLEASE FORWARD ENCLOSED REPLY CARD AT ONCE.

FORM 97-1954

Purchase Order

MAY 20 1959

THIS NUMBER MUST APPEAR ON ALL INVOICES, PKGS., & CORRESPONDENCE RELATIVE TO THIS SHIPMENT.
NO. 10369

FROM: [illegible]

1009 E. Baltimore St.,
Baltimore 2, Md.

EAstern 7-5745 & 7-5746

TO: JENNINGS & CO.
430[illegible] N. LAKE ST.
CHICAGO, ILLINOIS

CHARGE NOTICE 5/21/59 LPC
CALL PRIOR TO SHIPPING

DATE MAY 19, 1959 WHEN SHIP SEE BELOW VIA ~~[illegible]~~

AIR CARGO COLLECT
SEABOARD WESTERN

SHIP TO W.J.BYRNES CO.
25 SEC-D AVE NY NY
FOR EXPORT TO
U.S. ARMY HOTEL TRANSIT BILLETING
NURNBURG, GERMANY

QUANTITY	NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
2		STAR CHIEF 25¢ ~~[illegible]~~ NC LIGHTS CHAIR SP 80-20		
2		10¢ " " " " " " " "		
—		5¢ " " " " " " " "		
		Rose Gleeson		

IN THE BODY OF THE BILL OF LADING KITE PHONE [illegible] 3-4740 UPON [illegible] IN [illegible] YORK

NOTE: THIS IS AN [illegible] ORDER. WE DO NOT HAVE APPROVAL YET. PLEASE DO NOT PROCESS. WE WILL LET YOU KNOW [illegible].

NOTE - DUE TO THE SPECIAL REQUIREMENTS AND URGENCIES OF THE EXPORT TRADE, WE MUST INSIST ON YOUR IMMEDIATE ACKNOWLEDGEMENT OF THIS PURCHASE ORDER. PLEASE FORWARD ENCLOSED REPLY CARD AT ONCE.

FORM 971625

Purchase Order

THIS NUMBER MUST APPEAR ON ALL INVOICES, PKGS., & CORRESPONDENCE RELATIVE TO THIS SHIPMENT.

NO. ~~EXPORT~~ 25-5-1

FROM: MOT-O-MATIC INCORPORATED

1009 E. Baltimore St., Baltimore 2, Md.

EAstern 7-5745 & 7-5746

MAY 27 1959

TO: JENNINGS & CO.
4309 W. LAKE ST.
CHICAGO, ILLINOIS

DATE MAY 25, 1959 WHEN SHIP SEE BELOW VIA SEE BELOW

SHIP TO OFFICERS & CIVILIAN OPER 'ESS
U.S. ARMY EGN 286
MUNICH, GERMANY

QUANTITY	NUMBER	DESCRIPTION	UNIT PRICE	AMOUNT
3		5¢ ELDORADO SUN CHIEFS		
2		10¢ " " "		
1		25¢ " " "		
		ASSORT THE PANEL COLORS 80-20 GUARANTEED JP		
		NO LIGHTS		

NOTE: THIS ORDER IS TO BE SHIPPED in EXACTLY 60-DAYS AFTER YOU SHIP OUR PURCHASE ORDER 00366. (00366 IS TO THE SAME PEOPLE AND THE ORDER WAS CUT DOWN TO 6 MACHINES ALL WITH GUARANTEED JACKPOTS.) PLEASE ADHERE TO THE ABOVE SHIPPING DATE. WHEN THE ORDER IS READY PLEASE CALL ME AND WE WILL TELL YOU HOW TO SHIP.

JOE.

NOTE- DUE TO THE SPECIAL REQUIREMENTS AND URGENCIES OF THE EXPORT TRADE, WE MUST INSIST ON YOUR IMMEDIATE ACKNOWLEDGEMENT OF THIS PURCHASE ORDER. PLEASE FORWARD ENCLOSED REPLY CARD AT ONCE.

CLASS OF SERVICE
This is a fast message unless its deferred character is indicated by the proper symbol.

WESTERN UNION
TELEGRAM

COPY

W. P. MARSHALL, PRESIDENT

SYMBOLS
DL = Day Letter
NL = Night Letter
LT = International Letter Telegram

1201

The filing time shown in the date line on domestic telegrams is STANDARD TIME at point of origin. Time of receipt is STANDARD TIME at point of destination

GTC83 PA 918

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JENNINGS AND CO
4309 WESTLAKE ST CHCO

ORDERS CONFIRMED PROCESS ALL ORDERS IMMEDIATELY

MAR-MATIC

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

Office-Supreme Court, U.S.
FILED
JUN 10 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1958.

No. 944

HERSHEY MFG. CO., AN ILLINOIS CORPORATION,
Appellant,

vs.

BENJAMIN S. ADAMOWSKI, INDIVIDUALLY AND AS STATE'S ATTORNEY OF COOK COUNTY; JOSEPH D. LOHMAN, INDIVIDUALLY AND AS SHERIFF OF COOK COUNTY; TIMOTHY J. O'CONNOR, INDIVIDUALLY AND AS COMMISSIONER OF POLICE OF THE CITY OF CHICAGO, WILLIAM G. MILOTA, INDIVIDUALLY AND AS BAILIFF OF THE MUNICIPAL COURT OF CHICAGO; AND LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

OBJECTIONS TO APPLICATION FOR INJUNCTION PENDING FINAL DETERMINATION ON APPEAL.

BENJAMIN S. ADAMOWSKI,
State's Attorney of Cook County, Illinois.

FRANCIS X. RILEY,
EDWARD J. HLADIS,
Assistant State's Attorneys of Cook County, Illinois.
507 County Building,
Chicago 2, Illinois,
Counsel for Certain Appellees.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 1959

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 944.

HERSHEY MFG. CO., AN ILLINOIS CORPORATION,
Appellant,

vs.

BENJAMIN S. ADAMOWSKI, INDIVIDUALLY AND AS STATE'S ATTORNEY OF COOK COUNTY; JOSEPH D. LOHMAN, INDIVIDUALLY AND AS SHERIFF OF COOK COUNTY; TIMOTHY J. O'CONNOR, INDIVIDUALLY AND AS COMMISSIONER OF POLICE OF THE CITY OF CHICAGO; WILLIAM G. MILOTA, INDIVIDUALLY AND AS BAILIFF OF THE MUNICIPAL COURT OF CHICAGO; AND LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

OBJECTIONS TO APPLICATION FOR INJUNCTION PENDING FINAL DETERMINATION ON APPEAL.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court:

Benjamin S. Adamowski, individually and as State's Attorney of Cook County, Illinois, and Joseph D. Lohman, Sheriff of Cook County, Illinois, appellees herein, by their attorney, Benjamin S. Adamowski, respectfully submit that the application of the appellant for injunction pend-

ing the final determination of the cause by the Supreme Court of the United States should be denied for the following reasons:

I.

No injunctive relief should be granted because the federal court lacks original jurisdiction of this action. The statutory requirements of Title 28, U. S. C. A., Section 1331 are not fulfilled because no substantial federal question is presented. This arises from the fact that the federal court must first determine the *non-federal* question as to whether any of the Illinois gambling statutes can be applied to the appellant's slot-machine parts and sub-assemblies—a question which has never been presented and decided by any Illinois court. This fundamental issue has been analyzed in the aforesaid appellees' "Answer to Motion to Vacate," filed in this cause on March 9, 1959. Although it has been transmitted to this Court as part of the record, we attach a copy herewith as Appendix "A" for the convenience of the Court; and we respectfully invite the Court's attention to it.

The extensive interrogation of Mr. Yowell, counsel for appellant, by Judge Campbell and Judge Hoffman during the proceedings of April 14, 1959 leaves no doubt that the majority of the Three-Judge Court was concerned with the question of *original* jurisdiction of the United States District Court. We submit that counsel's own response (Tr. 12) that the federal court must first determine the *non-federal* question of the applicability of the Illinois statute to the appellant's devices—a question heretofore undecided by any Illinois court—determines definitely that the United States District Court does not have original jurisdiction of this action within the purview of Title 28, U. S. C. A., Section 1331.

This has been a paramount issue in this litigation since

it was commenced on July 14, 1958. During the course of the proceedings of July 17, 1958, Judge Perry, sitting as emergency Judge, recognized this issue immediately and urged this appellant to seriously consider an appropriate action in the state court (Tr. 19). During the extensive proceedings of July 25 and July 28, 1958, he stated that the appellees' position was meritorious but that he would defer action to the Three-Judge Court and would take the motion under advisement (Tr. 52, 53, 101). If he alone were deciding the question, he would sustain the appellees (Tr. 41). It was Judge Perry's view that he could make a finding as to jurisdiction for the *limited* purpose of entering the restraining order (Tr. 114).

The decisions in *Doud* v. *Hodge*, 350 U. S. 485 and *Toomer* v. *Witsell*, 334 U. S. 385, are clearly inapplicable.

In *Doud*, the *original* jurisdiction of the United States District Court was never challenged. There were no unresolved questions of state law or of the applicability of the challenged state statute; the situation in the case before the bar is exactly opposite. As a matter of fact, upon questioning by Judge Hoffman during the proceedings of April 14, 1959 (Tr. 43-44), Mr. Yowell practically conceded that this case did not apply.

In *Toomer*, it is clear that there were no unresolved questions of state law except the statute relating to state income taxes. *Toomer* v. *Witsell*, 334 U. S. 385, 392. As to the state income tax statute, this Court held that the District Court did not have jurisdiction to entertain it. *Toomer* v. *Witsell*, 334 U. S. 385, 406.

It would indeed represent a strange anomaly in the law if this Court were to exercise its extraordinary injunctive power and stay the enforcement of state criminal statutes through the vehicle of a lawsuit, which, according to the view of three out of four federal judges, is not within the original jurisdiction of the United States District Court.

II.

Even in cases where the original jurisdiction of the United States District Court is present, it is the announced policy of the federal courts not to interfere with the enforcement of state criminal statutes. This policy is reflected in both judicial decisions and congressional enactments, which are analyzed in the attached appellees' "Answer to the Motion to Vacate." This policy certainly should prevail where the District Court is without original jurisdiction.

The case at bar emphasizes the wisdom of this policy of non-interference. The enforcement of an Illinois criminal statute was restrained by the federal court from July 28, 1958 to April 14, 1959, when that Court finally determined that it did not have jurisdiction of the cause, and therefore no jurisdiction to restrain the Illinois officers. This policy against federal intervention is peculiarly applicable here where non-federal questions remain unresolved by any Illinois court.

III.

In addition to the want of original jurisdiction, the appellant is not entitled to any injunctive relief because it has an adequate remedy at law. These are clearly itemized in the trial court's Memorandum and Order of February 9, 1959.

Questions of the applicability of any Illinois gambling statute to the plaintiff's slot-machine parts and subassemblies and to the constitutionality of the challenged act can be raised and determined in the following proceedings: (1) the hearing before a judge, justice or court to determine the disposition of seized property (chap. 38, Sec. 697, Ill. Rev. Stats.); (2) replevin (chap. 119, Sections 1 *et seq.*, Ill. Rev. Stats.); (3) declaratory judgment (chap. 110,

Sec. 57.1, Ill. Rev. Stats.); (4) an action for damages if the property is destroyed, *Lawton* v. *Steele*, 152 U. S. 133.

IV.

The appellant's instant Application for Injunction does not present a complete picture of the facts.

In Point III, which is found at page 4 of its Application, the appellant weaves several clauses, taken out of context from the trial court's majority Memorandum and Order. This paragraph may well create the impression that the Memorandum and Order is self contradictory and that the conclusion of the majority is not supported by its reasoning.

The majority did not categorically state that "the single statute challenged in this complaint would seem to violate the due process clause of the Fourteenth Amendment of the United States Constitution". The exact words of the majority, which convey an entirely different meaning, are found at page 5 of its Memorandum and Order:

> "This Court cannot assume jurisdiction of this case because the single statute challenged in this complaint may seem to violate the due process clause of the 14th Amendment of the United States Constitution."

The majority of the trial court did not expressly find that the complaint presents a substantial federal question "for a single district judge". At page 4 of its Memorandum and Order, the majority said that the airport phase of the litigation *might* be a matter for a single federal judge.

The appellant fails to note that the majority's decision also turned on the fact that a federal court will not exercise its jurisdiction but will dismiss a complaint "which asks a decision on the merits concerning unresolved questions of State law and questions of Constitutional law never before decided by the State Supreme Court".

The appellant's reliance upon *Doud* v. *Hodge*, 350 U. S.

485, and *Toomer* v. *Witsell*, 334 U. S. 385 has been discussed elsewhere. Those cases do not conflict with the case before the bar. We respectfully submit that they are clearly inapplicable.

At the top of page 5 of the instant Application, the appellant states that it "manufactures only parts and subassemblies of slot machines intended for shipment to Nevada where the assembly and use of slot machines is lawful, and to foreign countries, etc." This is not a full and complete disclosure and may well convey the impression that it manufactures only parts and that the merchandise is shipped only to Nevada or foreign countries. During the proceedings of July 25 and July 28, 1958, the secretary of the appellant corporation testified that it sold to exclusive distributors in other *states* and that it had a distributor in the State of Illinois to whom it sold. He further testified that the appellant corporation manufactured all parts for a slot machine (Tr. 95-96). This is borne out by the purchase orders which constitute appendix "B" of the instant Application. It appears that appellant's customers order complete machines and not parts.

The police action of April 15, 1959, referred to at page 6, was proper, Rule 62(a) and 62(c), Federal Rules of Civil Procedure. The appellant has made no showing to the contrary.

The order of May 19, 1959, entered in the Municipal Court of Chicago, in the cause entitled *People of the State of Illinois* v. *Buckley Manufacturing Co.*, a corporation, and *Hubert Buckley*, Nos. 58 MC 36047 and 58 MC 37040, has not become final. It has been assigned to the appellate division of the State's Attorney's office for analysis and review. The appellees deny that, nevertheless, they continue to threaten to enforce said statute against appellant.

V.

This matter was first argued extensively before the emergency judge on July 25 and July 28, 1958. As stated previously, he indicated that the District Court lacked jurisdiction and that the appellant should resort to remedies in the state court.

It was argued again at length before the Three-Judge Court on September 29, 1958 and reconsidered after argument on April 14, 1959. The majority was of the firm view that the Court lacked jurisdiction and that the appellant was entitled to no injunctive relief. Weight should be accorded the views of these judges.

An order granting or denying injunctive relief will not be disturbed by the reviewing court unless the discretion of the lower court was abused and improvidently exercised. *Alabama* v. *United States*, 279 U. S. 229, 231. The appellant has demonstrated no abuse of discretion. It has never met the basic jurisdictional challenge in this case. It has advanced no justification for any judicial departure from the firm federal policy of non-intervention in state criminal matters. It has utterly failed to avoid the fact that Illinois law makes available four separate legal remedies where all issues, non-federal as well as federal, can be adjudicated. Opposed to the current wish of the appellant, we have the studied view and judgment of Judge Campbell, with broad experience of twenty years as a federal District Court Judge and Judge Hoffman with experience as a federal and a state court judge. Orderly administration of justice requires that these views should not be disturbed, except for very extraordinary reasons. No such reasons have been advanced by the appellant.

Moreover, a previous application was made to the Honorable Tom C. Clark, Associate Justice of this Court, who denied the application without qualification on April 24, 1959. Great weight should be accorded that determination. Inasmuch as the previous denial was not made without prejudice, the renewed application should not be favored, Rule 50 (5), Supreme Court Rules.

The instant application has not presented any substantially different or additional reason for injunctive relief. Furthermore, extraordinary equitable relief will not be granted if it may prove useless or inefficient. Even if the appellant prevailed in the instant application, it must face other Illinois statutory enactments. The provisions of Ch. 38, Sections 341-343, Ill. Rev. Stat., also relate to gambling devices. While the Supreme Court of Illinois has not determined whether slot-machine subassemblies and parts fall within the purview of these statutory provisions, strictly and properly a non-federal question, it has, as noted in the majority's Memorandum and Order, decided that gambling devices are not the legal subjects of property and are at all times liable to seizure, forfeiture and destruction without violating any constitutional provisions. Furthermore, this provision had been construed to include the "manufacture" of gambling devices. *The People v. One Device*, 410 Ill. 318, 321-322.

To paraphrase the firm judgment of Judge Campbell, as expressed on February 10, 1959 (Tr. 6-9) and again on April 14, 1959 (Tr. 70-72) there was no basis for granting any restraining order and the protection of the federal court has been extended to the appellant too long and without any authority.

WHEREFORE, the aforesaid appellees respectfully pray that the application of the appellant for an injunction pending the final determination of the cause by the Supreme Court of the United States be denied.

BENJAMIN S. ADAMOWSKI,
State's Attorney of Cook County, Illinois.

FRANCIS X. RILEY,
EDWARD J. HLADIS,
Assistant State's Attorneys of Cook County, Illinois,
507 County Building,
Chicago 2, Illinois,
Counsel for Certain Appellees.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois,
Eastern Division.

HERSHEY MFG. CO., an Illinois Corporation, *Plaintiff*,
vs.
BENJAMIN S. ADAMOWSKI, individually and as State's Attorney of Cook County, *et al.*, *Defendants*.
No. 58-C-1287.

ANSWER TO MOTION TO VACATE AND TO DENY MOTION TO DISMISS

Benjamin S. Adamowski, individually and as State's Attorney of Cook County, and Joseph D. Lohman, Sheriff of Cook County, defendants herein, by their attorney, Benjamin S. Adamowski, respectfully submit that the motion of the plaintiff to vacate the Memorandum and Order, entered February 9, 1959, and upon reconsideration to deny the motion to dismiss, and for other relief, should be overruled for the following reasons:

I.

The complaint does not present a substantial federal question within the original jurisdiction of the United States District Court as required by the provisions of Title 28, U. S. C. A., Section 1331. The defendants have

consistently maintained this jurisdictional attack since the very inception of this lawsuit in July, 1958.

The plaintiff has focused its statutory attack solely upon the provisions of Chap. 38, Sec. 344 *et seq.*, Ill. Rev. Stats. The State of Illinois, however, has also legislated on the same subject matter, namely gambling devices, in Chap. 38, Sections 341-343, Ill. Rev. Stats. The latter provisions, particularly Section 342, have been construed by the Supreme Court of Illinois in *People* v. *One Device*, 410 Ill. 318. That court determined that gambling devices, as defined in Section 342, are not lawful subjects of property. They are not, therefore, within the protection of the law, and their seizure and destruction does not result in a violation of any constitutional provisions. Irrespective of the challenged provisions, namely Chapter 38, Sections 344 *et seq.*, Ill. Rev. Stats., the provisions of Chapter 38, Sections 341-343, Ill. Rev. Stats. still classify the subject matter of this litigation as contraband and deprive it of any status of lawful property. Only lawful property, and not contraband, is protected by the federal constitution. The seizure of such contraband devices does not violate the due process clause of the federal constitution. *Lawton* v. *Steele*, 152 U. S. 133; *Durant* v. *Bennett*, 54 F. 2d 634. Furthermore, such contraband devices cannot find a protective sanctuary in the commerce clause of the federal constitution. *Sligh* v. *Kirkwood*, 237 U. S. 52; *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132.

In its complaint, the plaintiff alleges that the provisions of Chapter 38, Sections 344-348, Ill. Rev. Stats., have not been judicially interpreted so as to embrace slot-machine sub-assemblies and parts. In its motion to vacate, the plaintiff repeats the contention and expands it to apply to the provisions of Chapter 38, Sections 341-343. In effect, it is challenging the application of either statute to the subject matter of this litigation. We submit that this contention cannot fortify the plaintiff's position in the United States

District Court. On the contrary, it only serves to emphasize the lack of a substantial federal question in this cause.

If a case can be decided on either of two grounds, one involving a federal question, the other a question of statutory construction or general law, a federal court will decide only the latter. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288. On this basic and traditional principle, this Court must first decide whether the plaintiff's seized devices, namely slot-machine sub-assemblies and parts, fall within the prohibition of any Illinois statute—an issue which has never been determined by the Supreme Court of Illinois. If this issue is decided in the plaintiff's favor, the litigation is terminated and the federal question remains undecided. Though a federal right is pleaded, there is no certainty that it will ever be disputed. A case in this posture, however, is not a controversy arising under the Constitution or laws of the United States of which the District Court has original jurisdiction. The federal right must be an essential element of the plaintiff's cause of action. It must be necessary to the ultimate decision, and the decision must rest upon a construction of that right. The federal right must be the subject of a genuine and present controversy, not merely a possible or conjectural one. The fact that a question of federal law is lurking in the background, awaiting the prior determination of other non-federal issues, is insufficient to support the original jurisdiction of the United States District Court. *Gully* v. *First National Bank in Meridian*, 299 U. S. 109. The plaintiff's pleading on its face presents the question of the application of the Illinois statute to its seized product—a question which is to be determined by Illinois law. Whether this Court will reach the question of federal law is only a matter of conjecture at this stage of proceeding. In view of the foregoing, we submit that the dismissal of this cause was proper. This Court lacks original jurisdiction.

We further submit that any reliance upon the provisions of Title 28, U. S. C. A., Sections 2281 *et seq.*, will not cure the jurisdictional defect in this case. Before a three-judge court has the power to act, the plaintiff must present a controversy within the original jurisdiction of the United States District Court. Original federal jurisdiction may not be presumed. Nor can it be conferred upon the Court by waiver or consent of the parties.

Moreover, the case of *Doud* v. *Hodge*, 350 U. S. 485, cannot be the source of any comfort to the plaintiff in its argument in favor of jurisdiction. In that case, there was no question that the challenged act applied to the plaintiff in his business. *Doud* v. *Hodge*, 127 Fed. Supp. 853, 856. The act which regulated a lawful business had been interpreted by the Supreme Court of Illinois, and this was recognized by the federal courts. *Doud* v. *Hodge*, 127 Fed. Supp. 853; *Doud* v. *Hodge*, 146 Fed. Supp. 887, 891; *Morey* v. *Doud*, 354 U. S. 457. The only question for judicial determination was the federal constitutional issue. All preliminary issues of state law had been resolved.

The situation in the case before the bar is exactly the opposite. The challenged act is a criminal statute in the strictest sense of the term, which has never been interpreted by the Supreme Court of Illinois. It relates to contraband, not lawful property. Whether any of the Illinois gambling statutes apply to the plaintiff's seized devices is yet to be determined by the Supreme Court of Illinois. This question of state law must be resolved before any court can consider any federal rights. Such questions of statutory meaning and application are properly the business of a state court.

II.

If we assume, *arguendo*, that there is original federal jurisdiction in this cause, we submit that the doctrine of "discretionary abstention" in properly applicable in this action. In view of the dualism of sovereignty in the United States, it is the announced policy of the federal courts not to interfere with the enforcement of state criminal statutes. *Watson* v. *Buck*, 313 U. S. 387; *Douglas* v. *Jeanette*, 319 U. S. 157; *Stefanelli* v. *Menard*, 342 U. S. 117.

Congress has always been conscious of the sensitive relationship between the federal government and the several states. By its legislation, it has sought to prevent any conflict by refusing to vest the federal courts with jurisdiction over vital state matters until all methods of state relief have been exhausted.

The underlying philosophy of the three-judge court provisions is the prevention of improvident interference with state government and possible conflict between the federal and state authority. *Phillips* v. *U. S.*, 312 U. S. 246. State court proceedings shall not be stayed by a federal court except as expressly authorized by an Act of Congress. Title 28, U. S. C. A., Section 2283. A federal court is not empowered to examine the validity of a state court conviction until all available state remedies have been exhausted. Title 28, U. S. C. A., Section 2254. The federal courts have no jurisdiction to interfere with matters of state revenue where the state affords a speedy and efficient remedy. Title 28, U. S. C. A., Section 1341. The federal court is empowered to interfere with rate orders of state agencies only under limited circumstances. Title 28, U. S. C. A., Section 1342.

This policy of caution and abstention is peculiarly applicable to the instant case where neither the challenged criminal statute has ever been interpreted by the Supreme

Court of Illinois, nor the question of the applicability of any Illinois gambling statute to the plaintiff's products has ever been determined by that court. *Fenner* v. *Boykin*, 271 U. S. 240; *Essman* v. *Hood*, 45 F. 2d 881, 883.

III.

If this court has original jurisdiction and the doctrine of "discretionary abstention" is not applicable, the plaintiff is not entitled to any equitable relief because it has an adequate remedy at law. These are clearly itemized in the Memorandum and Order of February 9, 1959.

Questions of the applicability of any Illinois gambling statute to the plaintiff's devices and to the constitutionality of the challenged act can be raised and determined in the following proceedings: (1) the hearing before a judge, justice or court to determine the disposition of seized property (Chap. 38, Sec. 697, Ill. Rev. Stats.); (2) replevin (Chap. 119, Sections 1 *et seq.*, Ill. Rev. Stats.); (3) declaratory judgment (Chap. 110, Sec. 57.1, Ill. Rev. Stats.); (4) an action for damages if the property is destroyed. *Lawton* v. *Steele*, 152 U. S. 133.

Plaintiff's concern over a series of replevin suits is unfounded. If it should prevail in any of its claims during the course of any of the aforesaid legal actions, it could thereafter obtain proper equitable relief against further and continued seizures if such should occur.

These suggestions of the plaintiff that the opinion of the majority of this court insofar as it itemizes the adequate remedies at law constitutes a determination on the merits without a hearing and supporting findings of fact is without merit. No evidence and resulting findings of fact are required in questions of this type. They are a matter of state law of which the federal court will take judicial notice. *Bowen* v. *Johnston*, 306 U. S. 19, 23; *Laubenheimer* v. *Factor*, 61 Fed. 2d 626, 630.

WHEREFORE, the aforesaid defendants respectfully pray that the motion of the plaintiff to vacate and upon reconsideration to deny the motion to dismiss be overruled and that the Motion and Order of this court entered on February 9, 1959, be reaffirmed.

BENJAMIN S. ADAMOWSKI,
State's Attorney of Cook County, Illinois.

By: EDWARD J. HLADIS,
Assistant State's Attorney.

Office-Supreme Court, U.S.
FILED
JUN 19 1956
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 944

HERSHEY MFG. CO., AN ILLINOIS CORPORATION,
Appellant,

vs.

BENJAMIN S. ADAMOWSKI, INDIVIDUALLY AND AS STATE'S ATTORNEY OF COOK COUNTY; JOSEPH D. LOHMAN, INDIVIDUALLY AND AS SHERIFF OF COOK COUNTY; TIMOTHY J. O'CONNOR, INDIVIDUALLY AND AS COMMISSIONER OF POLICE OF THE CITY OF CHICAGO; WILLIAM G. MILOTA, INDIVIDUALLY AND AS BAILIFF OF THE MUNICIPAL COURT OF CHICAGO; AND LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM.

BENJAMIN S. ADAMOWSKI,
State's Attorney of Cook County, Illinois.

FRANCIS X. RILEY,
EDWARD J. HUADIS,
Assistant State's Attorneys of Cook County, Illinois.
507 County Building,
Chicago 2, Illinois.
Counsel for Certain Appellees.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 944

HERSHEY MFG. CO., AN ILLINOIS CORPORATION,
Appellant,

vs.

BENJAMIN S. ADAMOWSKI, INDIVIDUALLY AND AS STATE'S ATTORNEY OF COOK COUNTY; JOSEPH D. LOHMAN, INDIVIDUALLY AND AS SHERIFF OF COOK COUNTY; TIMOTHY J. O'CONNOR, INDIVIDUALLY AND AS COMMISSIONER OF POLICE OF THE CITY OF CHICAGO; WILLIAM G. MILOTA, INDIVIDUALLY AND AS BAILIFF OF THE MUNICIPAL COURT OF CHICAGO; AND LATHAM CASTLE, ATTORNEY GENERAL OF THE STATE OF ILLINOIS,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO AFFIRM.

The appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

STATEMENT.

The decision of the majority of the District Court, entered on February 9, 1959, turned on three grounds: (1) The Court did not have jurisdiction of the action; (2) the District Court should dismiss the complaint which asks a decision on the merits concerning unresolved questions of state law and questions of constitutional law never before decided by the State Supreme Court; and (3) the appellant is not entitled to equitable relief because it has many adequate remedies at law which are provided by the Illinois courts.

ARGUMENT.

The majority decision of the United States District Court is correct as to all three grounds upon which it is based.

I.

The complaint does not present a substantial federal question within the original jurisdiction of the District Court, as required by the provisions of Title 28, U. S. C. A., Section 1331. The alleged federal question is only remote and conjectural and awaits the prior judicial determination of unresolved non-federal questions of state law—a determination, which is properly the business of the State court, and which might terminate the litigation.

In its complaint, the appellant alleges that the challenged provisions of Chapter 38, Sections 344-348, Ill. Rev. Stats. have not been judicially interpreted so as to apply to slot-machine sub-assemblies and parts. It has never abandoned this claim. The contention was repeated in its "Motion to Vacate". During the course of oral argument on April 14, 1959, its counsel stated that the federal court must first determine the non-federal question of the applicability of the Illinois statute to the appellant's devices—a question heretofore undecided by any Illinois court (Tr. 12).

Furthermore, the judicial resolution of the non-federal question of the applicability of the challenged statute will not set the stage for a decision on the alleged federal question. It is then incumbent upon the District Court to ascertain whether the appellants' slot-machine sub-assemblies and parts enjoy the status of lawful property so as to enjoy any constitutional protection. If the State of Illinois has enacted legislation, other than the challenged

statute, which deals with the appellant's devices, the District Court is entitled to take judicial notice thereof in order to resolve this basic and paramount question. *Bowen* v. *Johnston*, 306 U. S. 19, 23.

Although the appellant has focused its attack solely upon the provisions of Chap 38, Sec. 344 *et seq.*, Ill. Rev. Stats., the State of Illinois has also legislated on the same subject matter, namely gambling devices, in Chap. 38, Sections 341-343, Ill. Rev. Stats. These latter provisions, particularly Section 342 have been construed by the Supreme Court of Illinois in *People* v. *One Device*, 410 Ill. 318, 321-322. That court determined that devices which are manufactured, made, or kept for gambling purposes and have no potential for lawful use, are gambling devices *per se* and are not the lawful subjects of property. They are not, therefore, within the protection of the law, and their seizure and destruction does not result in a violation of any constitutional provisions. Irrespective of the challenged provisions, namely Chap. 38, Sec. 344 *et seq.*, Ill. Rev. Stats., the provisions of Chap. 38, Secs. 341-343, Ill. Rev. Stats. still classify the subject matter of this litigation as contraband and deprive it of any status of lawful property. Only lawful property, and not contraband, is protected by the federal constitution. The seizure of such contraband devices does not violate the due process clause of the federal constitution. *Lawton* v. *Steele*, 152 U. S. 133, 136, 142-143; *Durant* v. *Bennett*, 54 F. 2d 634, 638-639. Furthermore, such contraband devices cannot find a protective sanctuary in the commerce clause of the federal constitution. *Sligh* v. *Kirkwood*, 237 U. S. 52, 60; *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 139.

In its "Motion to Vacate," however, the appellant takes the position that the provisions of Chap. 38, Secs. 341-343, Ill. Rev. Stats. are not applicable to its devices. In effect, it is challenging the applicability of any Illinois statute to

the subject matter of this litigation. We submit that this contention cannot fortify the appellant's position in the United States District Court. On the contrary, it only serves to emphasize the lack of a substantial federal question in this cause.

If a case can be decided on either of two grounds, one involving a federal question, the other a question of statutory construction or general law, a federal court will decide only the latter. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 347. On this basic and traditional principle, the federal court must first decide whether the appellant's slot-machine sub-assemblies and parts, fall within the prohibition of any Illinois statute—an issue which has never been determined by the Supreme Court of Illinois. If this issue is decided in the appellant's favor, the litigation is terminated and the federal question remains undecided. Though a federal right is pleaded, there is no certainty that it will ever be disputed.

A case in this posture, however, is not a controversy arising under the Constitution or laws of the United States of which the District Court has original jurisdiction. The federal right must be an essential element of the appellant's cause of action. It must be necessary to the ultimate decision, and the decision must rest upon a construction of that right. The federal right must be the subject of a genuine and present controversy, not merely a possible or conjectural one. The fact that a question of federal law is lurking in the background, awaiting the prior determination of other non-federal issues, is insufficient to support the original jurisdiction of the United States District Court. *Gully* v. *First National Bank in Meridian*, 299 U. S. 109, 112-113, 117.

Before the federal court can embark upon any judicial examination of the alleged federal rights, it must first adjudicate the question of the applicability of the chal-

lenged statute to the appellant's slot-machine sub-assemblies and parts. It must also decide whether the other cited Illinois statutes apply to the appellant's devices in order to ascertain whether those devices are contraband or lawful property within the protection of the law. If the devices are contraband, they are not entitled to any legal protection. The genuineness of the alleged violation of federal rights vanishes.

Basically, this litigation presents a controversy, the resolution of which rests primarily upon the determination of the applicability of Illinois statutory law to the subject matter of this litigation—a question which has never been determined by the Supreme Court of Illinois. At the very threshold the District Court is faced with questions, which properly belong to the Illinois court. The decision on those non-federal issues might dispose of the entire litigation. Whether the federal court will ever reach any question of federal law is only a matter of conjecture at this stage of the proceeding. The need for a judicial determination may never present itself. In accordance with the *Gully* doctrine, a controversy in this posture does not present a sufficiently substantial federal question as would support the original jurisdiction of the United States District Court.

The decisions in *Doud* v. *Hodge*, 350 U. S. 485 and *Toomer* v. *Witsell*, 334 U. S. 385, are clearly inapplicable.

In *Doud*, the *original* jurisdiction of the United States District Court was never challenged. There was no question that the challenged act applied to the plaintiff in his business. *Doud* v. *Hodge*, 127 Fed. Supp. 853, 856. The act which regulated a lawful business had been interpreted by the Supreme Court of Illinois, and this was recognized by the federal courts. *Doud* v. *Hodge*, 127 Fed. Supp. 853, 856; *Doud* v. *Hodge*, 146 Fed. Supp. 887, 891; *Morey* v. *Doud*, 354 U. S. 457, 460, 464, 465. The only question for

judicial determination was the federal constitutional issue. All preliminary issues of state law had been resolved. As a matter of fact, during the proceedings of April 14, 1959 (Tr. 43-44), counsel for the appellant practically conceded that this case did not apply.

In *Toomer*, it is clear that there were no unresolved questions of state law except the statute relating to state income taxes. *Toomer* v. *Witsell*, 334 U. S. 385, 392. As to the state income tax statute, this Court held that the District Court did not have jurisdiction to entertain it. *Toomer* v. *Witsell*, 334 U. S. 385, 406.

Furthermore, it is clear that the District Court noted diversity of citizenship as a ground for federal jurisdiction. *Toomer* v. *Witsell*, 73 Fed. Supp. 371, 374. The same is true in *Lee* v. *Bickell*, 292 U. S. 415; *Bickell* v. *Lee*, 5 Fed. Supp. 720, 721, and *Modern Woodmen of America* v. *Casados*, 15 Fed. Supp. 483, 484. In those cases, the jurisdiction of the federal court is grounded upon the diverse citizenship of the parties, regardless of the nature of the issues presented. Under the law, it could hear those cases even though *no* federal questions were presented.

We further submit that the cases of *United Airlines* v. *Public Utilities Commission*, 109 Fed. Supp. 13 and *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, do not support the appellant. In those cases, there was no question as to the applicability of the state law. The attention of the court was directed to the issue as to whether the federal statute had preempted the field and thereby excluded the jurisdiction of the state. Federal preemption, by the very nature of the concept, presupposes a federal statute and a state statute, both of which are *unquestionably* applicable in the same area. If, however, there is a genuine controversy, as in the case before the bar, as to the applicability of a state statute, any thoughts of preemption are pre-

mature. If the state statute is determined to be inapplicable, nothing remains to be preempted.

In the case before the bar, the challenged act is a criminal statute in the strictest sense of the term, which has never been interpreted by the Supreme Court of Illinois. Whether any of the Illinois gambling statutes apply to the appellant's devices is yet to be determined by the Supreme Court of Illinois. This question of state law must be resolved before any court can consider any federal rights. Such questions of statutory meaning and application are properly the business of a state court.

II.

If we assume, *arguendo*, that there is original federal jurisdiction in this cause, we submit that the doctrine of "discretionary abstention" is properly applicable in this action. In view of the dualism of sovereignty in the United States, it is the announced policy of the federal courts not to interfere with the enforcement of state criminal statutes. *Watson* v. *Buck*, 313 U. S. 387, 400-401; *Douglas* v. *Jeannette*, 319 U. S. 157, 162-164; *Stefanelli* v. *Minard*, 342 U. S. 117, 120-122.

It should be noted that in the last two cited cases, the federal court refused to interfere even though it did *in fact* have jurisdiction of the controversy. *A fortiori*, the doctrine should be invoked in the case before the bar where, it is submitted, the District Court lacks original jurisdiction.

Congress has always been conscious of the sensitive relationship between the federal government and the several states. By its legislation, it has sought to prevent any conflict by refusing to vest the federal courts with jurisdiction over vital state matters until all methods of state relief have been exhausted.

The underlying philosophy of the three-judge court provisions is the prevention of improvident interference with state government and possible conflict between the federal and state authority. *Phillips* v. *U. S.*, 312 U. S. 246. State court proceedings shall not be stayed by a federal court except as expressly authorized by an Act of Congress. Title 28, U. S. C. A., Section 2283. A federal court is not empowered to examine the validity of a state court conviction until all available state remedies have been exhausted. Title 28, U. S. C. A., Section 2254. The federal courts have no jurisdiction to interfere with matters of state revenue where the state affords a speedy and efficient remedy. Title 28, U. S. C. A., Section 1341. The federal court is empowered to interfere with rate orders of state agencies only under limited circumstances. Title 28, U. S. C. A., Section 1342.

This rule of non-interference has also been announced and exercised by this Court in cases involving state criminal prosecutions of federal officers—an area wherein one might expect the federal interest to prevail. Prompted by judicial caution, it has sanctioned federal intervention in those few narrow situations where the alleged criminal act was an act lawfully performed in the discharge of federal duty. The federal immunity was not extended to any act, which was not justified by federal duty. *Drury* v. *Lewis*, 200 U. S. 1, 8; *Maryland* v. *Soper*, 270 U. S. 9, 35; *Maryland* v. *Soper*, 270 U. S. 36, 43-44.

In the recent case of *Martin* v. *Creasy*, No. 157—October Term, 1958, the doctrine of abstention was applied for reasons appropriately applicable to the case at bar. As in *Martin*, the appellant can avail itself of various state legal remedies, which are noted elsewhere herein. It is properly the function of the Illinois courts to adjudicate the non-federal questions relating to the applicability and construction of the Illinois criminal statutes. After final

decision of the Supreme Court of Illinois, the appellant can still seek relief in this Court. Title 28, U. S. C. A., Sec. 1257. Such practice would promote the avoidance of a premature and perhaps unnecessary decision of a serious federal constitutional question and of the hazard of unsettling some delicate balance in the area of federal-state relationships. *Martin* v. *Creasy*, *supra*, concurring opinion.

To sanction federal intervention in state criminal affairs, while speedy state remedies are available, would only serve to disrupt the administration of state criminal justice. The recognition and appreciation of the delicate relationship between the federal and state sovereignties, particularly in matters affecting the administration of criminal justice, should resolve all doubts against federal intervention. Compare: *Stefanelli* v. *Minard*, 342 U. S. 117, 118, 123-124.

This policy of caution and abstention is peculiarly applicable to the instant case where neither the challenged criminal statute has ever been interpreted by the Supreme Court of Illinois, nor the question of the applicability of any Illinois gambling statute to the appellant's products has ever been determined by that court. *Fenner* v. *Boykin*, 271 U. S. 240, 243-244; *Watson* v. *Buck*, 313 U. S. 387, 401-402; *Essman* v. *Hood*, 45 F. 2d 881, 883.

III.

If this court has original jurisdiction and the doctrine of "discretionary abstention" is not applicable, the plaintiff is not entitled to any equitable relief because it has an adequate remedy at law.

Questions of the applicability of any Illinois gambling statute to the appellant's devices and to the constitutionality of the challenged act can be raised and determined

in the following proceedings: (1) the hearing before a judge, justice or court to determine the disposition of seized property (Chap. 38, Sec. 697, Ill. Rev. Stats.); (2) replevin (Chap. 119, Sections 1 *et seq.*, Ill. Rev. Stats.); (3) declaratory judgment (Chap. 110, Sec. 57.1, Ill. Rev. Stats.); (4) an action for damages if the property is destroyed. *Lawton* v. *Steele*, 152 U. S. 133, 142.

With reference to the hearing in accordance with Chap. 38, Sec. 697, Ill. Rev. Stats., it is the practice in Illinois to give proper notice to interested parties. This case is no exception.

It should also be noted that a prayer for injunctive relief can be joined with an action for declaratory judgment. *American Civil Liberties Union* v. *Chicago*, 3 Ill. 2d 334, 352. This appellant has the opportunity to seek the same relief in the Illinois courts—the proper forum for determination of the nonfederal questions present in this litigation.

We respectfully submit, therefore, that the appellant presents no substantial question for the decision of this Court, and that the judgment of the District Court should be affirmed.

Benjamin S. Adamowski by Edward J. Hladis

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APPENDIX A.

Chap. 38, Sections 341-343, Ill. Rev. Stats.

AN ACT to prohibit the use of clock, tape, slot or other machines or devices for gambling purposes. [Approved June 21, 1895. L. 1895, p. 156.] *Be it enacted by the People of the State of Illinois, represented in the General Assembly:*

341. OPERATING GAMBLING DEVICE — PENALTY.]

§ 1. Whoever in any room, saloon, inn, tavern, shed, booth or building or enclosure or in any part thereof operates, keeps, owns, rents or uses any clock, joker, tape or slot machine or any other device upon which money is staked or hazarded or into which money is paid or played upon chance, or upon the result of the action of which money or other valuable thing is staked, bet, hazarded, won or lost, shall upon conviction for the first offense be fined not less than one hundred ($100) dollars, and for a second offense be fined not less than five hundred ($500) dollars and be confined in the county jail for not less than six (6) months, and for the third offense shall be fined not less than five hundred ($500) dollars and be imprisoned in the penitentiary not less than two (2) years nor more than four (4) years. A coin-in-the-slot-operated mechanical device played for amusement which rewards the player with the right to replay such mechanical device, which device is so constructed or devised as to make such result of the operation thereof depend in part upon the skill of the player and which returns to the player thereof no coins, tokens or merchandise

shall not be considered to be a gambling device within the meaning of this Act and any right of replay so obtained shall not represent a valuable thing within the meaning of this Act. As amended by act approved July 7, 1953. L. 1953, p. 929.

342. GAMBLING DEVICE DEFINED—CONFISCATION—CERTAIN AMUSEMENT DEVICES NOT CONSIDERED GAMBLING DEVICES.]

§ 2. Every clock, tape machine, slot machine or other machine or device for the reception of money on chance or upon the action of which money is staked, hazarded, bet, won or lost is hereby declared a gambling device and shall be subject to seizure, confiscation and destruction by any municipal or other local authority within whose jurisdiction the same may be found. A coin-in-the-slot-operated mechanical device played for amusement which rewards the player with the right to replay such mechanical device, which device is so constructed or devised as to make such result of the operation thereof depend in part upon the skill of the player and which returns to the player thereof no coins, tokens or merchandise shall not be considered to be a gambling device within the meaning of this Act and any right of replay so obtained shall not represent a valuable thing within the meaning of this Act. As amended by act approved July 7, 1953. L. 1953, p. 929.

343. POSSESSION OF—PENALTY.]

§ 3. Every owner, occupant, lessee, mortgagee or other person in possession of any premises upon which any gambling device may be located and every person in the use, operation, lease or other possession of the same shall be fined for the first offense not less than one hundred ($100) dollars, and for the second offense

shall be fined not less than five hundred ($500) dollars and shall be confined in the county jail not less than six (6) months, and for the third offense shall be fined not less than five hundred ($500) dollars and shall be imprisoned in the penitentiary not less than two (2) years nor more than four (4) years.

Office Supreme Court, U.S.
FILED
JUN 25 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 944

HERSHEY MFG. CO., an Illinois Corporation,
Appellant,

vs.

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Appellees.

On Appeal from the United States District Court
For the Northern District of Illinois.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

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Appellees.

On Appeal from the United States District Court
For the Northern District of Illinois.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

I.

The appellee Adamowski's argument advanced in his motion to affirm* is that the challenged statute has not been construed as authorizing the action and threatened

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* Adopted by Attorney General of the State of Illinois.

action pursuant to the statute; that therefore before reaching the constitutional issues tendered it would be necessary for the district court to construe the statute and that since the district court might hold that the statute does not authorize the action sought to be enjoined the constitutional issues might never be reached, and such issues are thus remote and unsubstantial, and the district court of three judges is without jurisdiction.

Such argument is pure sophistry. First, the appellant has never claimed and appellees are in no position to claim that the challenged statute does not authorize the action taken. (R. 8, 197, 210, 297-299, 340, 373, 376.) Second, even if the statute did not authorize the action sought to be enjoined, the district court had jurisdiction to enjoin an unlawful interference with interstate commerce and the taking of property without due process of law and it was error for it to dismiss the complaint for want of jurisdiction.

It should be noted that the appellee's argument that the questions are not substantial is not based on the conventional claims that the federal questions presented are obviously without merit or have been foreclosed by prior decisions. *California Water Service Co.* v. *City of Redding*, 304 U.S. 252, 255. In the motion to affirm it is argued that the need for prior construction of the challenged statute renders the federal questions pleaded too remote and, therefore, unsubstantial. The substantiality of the questions themselves is not disputed. In fact, the motion states, at page 5, "Though a federal right is pleaded there is no certainty that it will ever be disputed."

In the motion it is contended that appellant's products are contraband within the definition of Chap. 38, Ill. Rev.

Stat., §341-343, particularly Section 342 (Motion to Affirm, p. 4). It is argued that the statement in *People* v. *One Device*, 410 Ill. 318, 321-322, that devices which are *manufactured* for gambling purposes, and have no potential for lawful use, are gambling devices *per se* and not the lawful subjects of property *is a holding* that parts and subassemblies of so-called slot machines manufactured for interstate shipment to Nevada and foreign countries for assembly and use in such places outside of the State of Illinois, are contraband.

This contention is inconsistent with other parts of the motion to affirm wherein it is stated "whether any of the Illinois gambling statutes apply to the appellant's devices is yet to be determined by the Supreme Court of Illinois" (Motion, p. 8) and "neither the challenged criminal statute has been interpreted by the Supreme Court of Illinois nor the question of the applicability of any Illinois statute to the appellant's products has ever been determined by that court". (Motion, p. 10)

Appellant does not in this action seek to restrain the enforcement of the 1895 Illinois gambling statute, Ch. 38, Ill. Rev. Stat. 1957, §341-343, because that statute does not apply to appellant's products and there have been no attempts and no threats to enforce said statute against appellant. (Rec. 299). The appellee Adamowski's reference to such statute is a "red herring". In effect he is saying that the federal court cannot restrain him from enforcing the challenged statute which he has applied against appellant and as so applied may well be unconstitutional because another statute which he is not seeking to enforce has not been construed.

Sligh v. *Kirkwood*, 237 U.S. 52, involved the constitutionality of a Florida statute making it a criminal offense

to deliver for shipment in interstate commerce citrus fruits then and there immature and unfit for consumption. The Court upheld the statute, noting that the case did not present a set of facts involving the shipment of such fruit for legitimate commercial purposes and that no act of Congress undertaking to regulate shipments of this character was involved.

Ziffrin, Inc. v. *Reeves*, 308 U.S. 132, involved the constitutionality of a Kentucky statute prohibiting the interstate shipment of liquor without strict compliance with regulatory provisions in the statute. Ziffrin was an Indiana corporation continuously engaged in receiving whiskey from distillers in Kentucky for direct carriage to consignees in Chicago. It brought suit against the Kentucky Commissioner of Revenue to enjoin him from enforcing the provisions of the alcoholic beverage control law. A three judge court dismissed the bill and on direct appeal the Supreme Court affirmed.

The plaintiff charged that the Kentucky law impaired its rights under the Commerce clause of the Constitution.

The Court said, at page 138:

> "The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without unfettered by the Commerce Clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale or possession irrespective of where produced or obtained or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them. *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 320. * * *"

The Court held that providing that whiskey removed from permitted channels was contraband and subject

to immediate seizure was within the police power of the state as the property so circumstanced could not be regarded as a proper article of commerce. *Sligh* v. *Kirkwood*, 237 U.S. 52, 59 (involving rotten oranges) and *Clason* v. *Indiana*, 306 U.S. 439 (involving a dead horse), were cited. The Court also said that it was within the police power of a state to ban the manufacture of intoxicating liquor even though it was destined for interstate shipment outside of the state. It said, at page 140:

> "• • • The state may decline to consider certain noxious things legitimate articles of commerce and inhibit their transportation. Property rights in intoxicants depend on state laws and cease if the liquor becomes contraband."

The Supreme Court has recognized that liquor has noxious qualities and the Wilson Act, 27 U.S.C.A., §121, the Webb-Kenyon Act, 27 U.S.C.A., §122, and the Twenty-first Amendment to the Constitution have had the effect of removing shipments of liquor from the protection of the Commerce Clause. *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U.S. 311, and *Leisy* v. *Hardin*, 135 U.S. 100. The *Ziffrin* case is not applicable to slot machines moving in interstate commerce. *Pace Manufacturing Co.* v. *Milliken*, 70 Fed. Supp. 740, at 742.

The statement in the motion at page 6 that in *Doud* v. *Hodge*, 350 U. S. 485, the original jurisdiction of the district court was not involved is in error. The district court decision at 127 Fed. Supp. 853, which was reversed by this Court in a unanimous decision, stated:

> "Plaintiffs argue that 'it is the function and duty of this court to determine whether or not the Act in question violates the Fourteenth Amendment as applied to these plaintiffs.'

"On the other hand the amicus curiae and the defendants argue that it is not the function and duty of this Court to determine that question unless and until plaintiffs secure an answer to question from the Illinois Supreme Court.

"It would seem that plausible argument could be made on behalf of plaintiffs, to the Illinois Supreme Court, predicated upon the fact that the identical similarity of the business conducted by American Express Company, which is exempt from regulation under the Act, and that in which plaintiffs intend to engage and which on its face the Act says must be regulated by the State, is an arbitrary discrimination. If this argument were made to and accepted as valid by the Illinois Supreme Court, it might well grant to plaintiffs the very relief which they are seeking in this Court and hence a suit of this character would be unnecessary. A three judge court, in a case involving a similar situation arising under the Currency Exchange Act of the State of Wisconsin, held that the exemption of the American Express Company rendered the statute discriminatory and unconstitutional as applied to the plaintiff in that case. *Currency Services* v. *Matthews*, 90 Fed. Supp. 40, at 43, 45. However, there no question was raised as to the federal court's jurisdiction, such as the question which now confronts us.

"Whether in plaintiffs' situation the Illinois Supreme Court would hold the exemption of American Express Company from the application of the Act constitutional or unconstitutional we do not know. Not having that prescience, and being unwilling to guess as to how the Illinois court would decide this question when and if it were presented to it, we have no jurisdiction to make that decision ourselves. Hence we cannot decide the constitutional question presented in the absence of such authoritative determination by the Illinois Supreme Court.

Plaintiffs seem to argue that in *McDougall* v. *Lueder*, 389 Ill. 141, the Illinois Supreme Court has already in effect decided that the Illinois Act as to plaintiffs does not violate the equal protection of the law provision of the federal Constitution and accordingly this Court should grant appropriate relief and that no further state court decision is necessary. In so figuring, plaintiffs overlook the plain distinction between the business of the plaintiffs in the *McDougall* case and the business in which they (plaintiffs herein) intend to engage. That distinction plaintiffs themselves have made and emphasized. The McDougall plaintiffs were engaged in the general broad activities of a currency exchange, as distinguished from the limited activities in which plaintiffs herein intend to engage. As we have seen, American Express Company operates only that part of a general currency business which is limited to the issuing and selling of money orders. It does it, without a license issued under the Act, within the same limits plaintiffs wish to operate without being licensed. The Illinois Supreme Court might find that to deny plaintiffs that right would be to deprive them of the same protection which American Express Company enjoys under the law. It well may be that the Illinois Supreme Court would hold the exemption of American Express Company unconstitutional as applied to persons in the position of these plaintiffs and at the same time adhere to its holding that the exemption is constitutional as applied to persons in the position of the McDougall plaintiffs. * * * The federal courts, before passing on the question urged by the present plaintiffs, must wait until the Illinois Supreme Court has spoken in answer to that same question.

It is therefore necessary that the amended complaint be dismissed for want of jurisdiction."

Toomer v. *Witsell*, 334 U.S. 385, is cited in the jurisdictional statement for the proposition that under the cir-

cumstances of this case there is no adequate remedy at law.

The fact that in addition to jurisdiction under Title 18 U. S. C. §1331, there was diversity jurisdiction under §1332 in *Lee* v. *Bickle*, 292 U.S. 415, and *Modern Woodmen of America* v. *Casados*, 15 Fed. Supp. 483, does not distinguish those cases, the first of which holds that jurisdiction must be determined from the facts well pleaded and not the decision which might eventually be reached, and the second of which holds that a three judge court can enjoin state officers who exceed their statutory authority without deciding constitutional questions which required the assembly of a three judge court.

In *United Airlines* v. *Public Utilities Commission*, 109 Fed. Supp. 13, the airline complained of the California Commission which was seeking to regulate it that the regulation of air travel between California and Catalina Island was preempted by the Civil Aeronautics Act and in seeking an injunction attacked the California statute, which had not been previously interpreted by the California courts as giving the state commission jurisdiction, as unconstitutional. The court held that such regulation was preempted and stated that it did not decide the constitutionality of the state statute. The court rejected the California Public Utilities Commission contention comparable to the contention here made that the federal court should decline jurisdiction in order to allow the state courts to adjudicate whether the Commission had jurisdiction. *United Airlines* v. *Public Utilities Commission*, 109 Fed. Supp. 13, at page 16.

In *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, paragraph 23 of the complaint alleged that the seizures of packaged stock butter from interstate shipments were made by the defendants as officers or agents of the State

of Alabama under the alleged color or pretended authority claimed by them to be in the laws of the State of Alabama Agricultural Code as amended.

It was further alleged in paragraph 24 of the complaint that "plaintiff is advised by counsel, informed and believes and on such advice, information and belief avers that neither the aforesaid statutes nor any other valid statute of the State of Alabama authorizes or justifies, when properly construed, the action of the defendants herein complained of, or interference with the plaintiff's business herein complained of, or their attempt to determine whether or not material used by the plaintiff in the manufacture of process or renovated butter will be deleterious to health or unwholesomeness in the finished product or their seizures on said occasions of said raw material above described and referred to."

Paragraph 25 of the complaint alleged on information and belief that the acts were "wholly outside of and beyond and without the statutes of the State of Alabama when properly construed inasmuch as the Congress of the United States has entered and preempted the field."

There was no prayer that the defendants be enjoined or restrained from enforcing said statute, the only prayers being determining, inspecting, seizing, searching, informing, etc.

II.

This Court will recognize that in *Watson* v. *Buck*, 313 U.S. 387, 400-403, the doctrine of discretionary abstention was applied where there had not been a specific application of the statute to a particular situation. In this case this Court is not being asked to forecast how the challenged statute might conceivably be applied in connec-

tion with a determination of its constitutionality. The statute has been applied by the appellees and the enforcement of the statute and continued threatened enforcement of the statute puts appellees out of business.

There is no question that the imminence of irreparable harm is great and immediate.

This Court has very recently had occasion to consider the application of the doctrine of discretionary abstention in several situations. *County of Allegheny* v. *Frank Mashuda Company*, No. 347, October Term, 1958, 359 U.S. .....; *Martin* v. *Creasy*, No. 157, October Term, 1958, 359 U.S. .....; and *Louisiana Power & Light Co.* v. *City of Thibodaux*, No. 398, October Term, 1958, 359 U. S. .....

This case presents still another situation where the doctrine is drawn in question. The opinion of the district court speaks of the doctrine of discretionary absention but the court says it is without jurisdiction and appellees insist that the district court is without original jurisdiction under Title 28, U.S.C., §1331. But assuming that the district court recognized its jurisdiction and simply abstained from the exercise of the jurisdiction, the question remains was it proper for the court to dismiss the complaint?

As this Court recognizes, the doctrine of discretionary abstention is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it. It can only be justified in the exceptional circumstances where the order to repair to the state courts would clearly serve an important countervailing interest.

The basis advanced for the use of the doctrine in this case is that the challenged statute which appellees have applied against appellant's business has not been previously interpreted as applying to appellant's business

and that if it does not apply then needless friction with state authorities would ensue from an injunction on constitutional grounds restraining the enforcement of the statute against appellant. The basis advanced loses sight of reality. Appellant's main concern is the maintenance of a business now in danger of extinction by reason of appellees' action under the challenged statute. The danger of irreparable injury is great and immediate. To meet this situation appellant sought an injunction in the district court.

The language prohibiting the manufacture of slot machines is clear. Manufacture ordinarily includes the manufacture of component parts, which is appellant's business. The manufacturing process in this case is completed outside of the State of Illinois.

The appellees are in no position to claim that the statute does not apply to appellant's business and appellant has never claimed that the statute does not apply. The charge that the statute is vague and uncertain pertains to the phrase "of the first class" and, therefore, in which counties the statute is applicable, but not to what constitutes the manufacturing of a slot machine.

There is no real countervailing interest in requiring appellant to repair to the state courts to obtain the relief that the district court is capable of granting simply because the statute has not been interpreted. If the statute does not apply to appellant's business the reason for granting an injunction would be to restrain the unauthorized interference with commerce and private property without due process of law. If the statute does apply, then the reason for an injunction is the invalidity of the statute under the Commerce and Supremacy clauses and clauses of the Fourteenth Amendment. In either event appellant's main purpose is an injunction.

The need for an injunction would not be mooted by a state court interpretation of the statute. An injunction will not disrupt an established state administrative process. The complaint alleges that the statute which has been in existence for forty years, the length of time which appellant and its corporate predecessor have been established, has never been used against it before so it cannot be said that restraint upon the use of the statute now against appellant would disrupt established state policy. State taxes are not involved. An injunction would not create needless friction by unnecessarily enjoining state officials from executing domestic policies. Appellant is entitled to an injunction from the district court whether or not the statute applies.

If a countervailing interest were actually present the district court should have retained jurisdiction to permit the parties to repair to the state courts and erred in holding that it was without jurisdiction and dismissing the complaint.

III.

The argument that appellant has an adequate remedy at law in the state courts since it may seek equitable relief in connection with a declaratory judgment suit in the state courts exhibits a lack of understanding as to what is meant by the term "adequate remedy at law".

Appellees have advanced no reason why *Toomer* v. *Witsell* is not applicable.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1958.

No. 944

HERSHEY MFG. CO.

Appellant,

vs.

BENJAMIN S. ADAMOWSKI, et al.

Appellees.

PETITION FOR REHEARING.

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The Scheffer Press, Inc.—ANdover 3-6850

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Appellees.

PETITION FOR REHEARING.

To The Honorable Chief Justice Of The United States And The Associate Justices of the Supreme Court.

Petitioner, Hershey Mfg. Co., prays that this Court grant this petition for rehearing, vacate its order of June 29, 1959, which affirmed the judgment of the District Court, reverse said judgment and remand the cause to the District Court with directions to dismiss for mootness if the State court proceedings hereinafter described have proceeded to judgment or, if otherwise, to take other appropriate action.

On June 29, 1959, the last day of the October, 1958 Term of the Court, the following decision was rendered: "Per Curiam. The judgment is affirmed. Although the District Court had jurisdiction, *Doud* v. *Hodge*, 350 U.S. 485, we accept its *finding* that there was no *showing* of irreparable injury". (Italics added.)

We respectfully suggest that the language of the Court in the foregoing short per curiam opinion clearly indicates that the Court was under the impression that the judgment of the District Court followed a trial on the merits and findings of fact, whereas there was no trial on the merits and no findings.* The District Court's action followed motions to dismiss, which by their nature admitted the allegations of the complaint including allegations of irreparable injury as shown by the jurisdictional statement Pages 7 and 8. This case is unlike *Doud* v. *Hodge*, 350 U.S. 485, wherein the District Court had a trial on the merits and made findings of fact. This Court having determined that the District Court had jurisdiction should have reversed and remanded the cause to the District Court.

However, because of the continued denial to appellant of the right to run its business without threat of enforcement of the challenged statute and the indisposition of the Court to grant relief, appellant on July 1, 1958, filed a complaint for injunction in the Superior Court of Cook County, Illinois against the Appellee Adamowski and the cause is now set for trial in that court for September 28, 1959.

In the event that the State Court proceeds to judgment these proceedings will be rendered moot. In the meantime

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* Judge Perry, the Emergency Judge who was not a member of the panel of three judges, heard evidence on a motion for a temporary restraining order pursuant to Title 28 U.S.C. §2284(3) and the transcript of that evidence is included in the record on appeal (R. 68). Judge Perry found that appellant would suffer irreparable injury unless the temporary restraining order issued (R. 59-60) and his finding was fully supported by the evidence before him. The three-judge court which acted on the motions to dismiss heard no evidence and did not purport to review Judge Perry's findings on the evidence which Judge Perry heard.

the District Court could proceed to trial or stay proceedings pending a State court determination.

In any event the language of this Court's short per curiam opinion conveys the erroneous impression that there was a trial on the merits and findings of fact in the District Court and that language ought to be corrected so that the record is accurate and no claim of *res judicata* on the issue of irreparable injury could conceivably be made.

For the foregoing reasons your Petitioner prays that the order affirming the District Court judgment be vacated, and the Court enter an order reversing the District Court judgment and remanding with directions to dismiss for mootness if the State court proceedings have proceeded to judgment or, if otherwise, to take other appropriate action.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

.....

Being one of the counsel
for petitioner.